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APPENDIX

FILED
JUL 28 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-26

No. ~~867~~

MILLARD GOODING, Warden,
Appellant,

—v.—

JOHNNY C. WILSON,
Appellee.

ON APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Appeal Filed October 17, 1970
Probable Jurisdiction noted June 21, 1971

WILSON - LINES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

DOCKET ENTRIES

1969	Date—Proceedings.
Mar.	5—Pet. for writ of habeas corpus, with pauper's affidavit, and order allowing pet. filed in forma pauperis & directing petitioner & respondent to file brfs. with the ct. on the constitutional ques- of the validity of Ga. Code Sec. 26-6303 within 10 days, filed. Copy to counsel. Copy to Warden. Copy of pet. to Warden & Att'y Gen. Bolton.
Mar.	13—Request of Att'y (Franklin H. Pierce, for Richmond Co.), for exten. of time to file br. filed. Order extending time for filing brfs. until April 1, 1969, filed. Copy to counsel.
	Notice, and motion for leave to file brief amicus curiae by Arthur K. Bolton, Atty. Gen., St. of Ga., in support of respondent—filed. To SOS with file.
Mar.	24—Order filed that Atty. Gen. Arthur K. Bolton is granted leave to file amicus curiae brief in support of respondent & time for filing same extended until 4-1-69. Copies to counsel.
April	1—Brief amicus curiae of the Attorney General of Georgia, filed.
April	2—SUBMITTED ON PETITION FOR WRIT OF HABEAS CORPUS.
April	1—Petitioner's brief on the validity of Georgia Code § 26-6303, filed. To SOS. Brief of respondent filed.
July	8—Order filed ruling Court must conclude that Ga. Code 26-6303 is unconstitutionally vague and broad, and the conviction therefor is set aside; that portion of deft's. confinement attributable to a conviction under this statute must necessarily fall, and SO ORDERING.

1969	Date—Proceedings.

JUDGMENT filed and entered by Clerk in favor of petitioner and against respondent. (Copy of order & judgment to counsel) .

July 11—Respondent's *notice of appeal to the U.S.C.A.*, filed. Copy to petitioner's counsel & copy to U.S.C.A. with copy of docket sheet.

July 17—Respondent's notice of appeal to the Supreme Court of the U. S., filed. Copy to U.S.C.A., U.S.S.C., & petitioner's counsel.

Petitioner's motion for release on his recognizance or for bail pending appeal, filed. Brief in support, filed.

July 24—Order that respondent forthwith produce petitioner, Johnny C. Wilson, at office of U.S. Marshal, U.S. Courthouse Bldg., Augusta, Ga., & release petitioner from further confinement upon petitioner giving reasonable bail in amt. of $1,000.00 on his own recognizance, or posting bond with surety in said amt., said bail shall be conditioned upon petitioner personally appearing to abide the final order, judgment or sentence upon him, this his bond to be void, else of force; that respondent may appear before Judge Smith on August 11, 1969, at the U.S. Courtroom 232, Atlanta, Ga., & show cause, if any he has, why petitioner should not be continued at liberty on bail provided herein & that copy of order be served forthwith upon respondent, filed. Certified copies of order to U.S. Marshal, Augusta, Ga., & U.S. Marshal, Atlanta, Ga. Certified copy to respondent. Copy to counsel. Certified copy to Att'y Gen. Bolton.

ATTEST: A TRUE COPY.
CERTIFIED THIS
29th DAY OF JULY, 1969.
CLAUDE L. GOZA
Clerk

By: /s/ HELEN D. SMITH
Deputy Clerk

5. Georgia Code Annotated § 26-6303, under which petitioner was convicted on counts 3 and 4 of the indictment is on its face unconstitutionally vague and overbroad in violation of the first amendment and due process clause of the fourteenth amendment, it failing to apprise persons with sufficient particularity of the conduct which is sought to be prohibited and, by its excessive breadth, prohibiting activity protected by the first amendment. A copy of the statute is attached as Exhibit 3.

6. Georgia Code Annotated § 26-6303 is unconstitutionally vague and overbroad in violation of the first amendment and due process and equal protection clauses of the fourteenth amendment as applied to petitioner in the following respects:

(a) Neither the case law of the State of Georgia, the trial court, nor the Supreme Court of Georgia defined the words "opprobrious words or abusive language," thereby leaving the determination of petitioner's guilt to the discretion of the jury without adequate safeguards of petitioner's due process right of notice or first amendment right of freedom of speech.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action Number 12511

[Filed March 5, 1969]

JOHNNY C. WILSON,
Petitioner,

MILLARD GOODING, Warden of the Richmond County, Georgia, Public Works Camp,
Respondent.

ORDER

The habeas corpus petition in the within case presents serious and important jurisdictional questions under the provisions of 28 U.S.C.A. § 2254. The court has concluded that the petition shows on its face that available state remedies have not been exhausted as to the contentions raised in paragraph 6(b), paragraph 7, paragraph 8, and paragraph 9. Accordingly, the petition is dismissed as to said grounds. *Peters* v. *Rutledge*, 397 F.2d 731 (5th Cir. 1968); *Henderson* v. *Dutton*, 397 F.2d 375 (5th Cir. 1968); *Rearden* v. *Smith*, —— F.2d —— (5th Cir. 26183, 1968); *Fox* v. *Dutton*, —— F.2d —— (5th Cir. 26060, 1968).

However, the court has concluded that the prisoner has exhausted his remedies as to the contentions raised in paragraph 5 and paragraph 6(a), attacking the conviction in the alleged unconstitutionality of Georgia Code § 26-6303. The ruling by the Georgia Supreme Court in 223 Ga. 531 (July 14, 1967) obviates the need to raise and appeal the identical question by state habeas corpus. *Duke* v. *Wingo*, 386 F.2d 304 (6th Cir. 1967); *Staino* v. *Brierly*, 387 F.2d 597 (3rd Cir. 1967); *Hamric* v. *Bailey*, 386 F.2d 390 (4th Cir. 1967); *Cox* v. *Russell*, 283 F. Supp. 171 F. Supp. 171 (D.C. Pa. 1968).

Moreover, while direct appeal was available on this question under 28 U.S.C.A. § 1257 to the United States Supreme Court and petitioner erroneously sought to proceed by certiorari, apparently this is no bar to a direct proceeding in District Court indirectly testing the same constitutional question previously ruled upon by the state Supreme Court. *Fay* v. *Noia*, 372 U.S. 391 (1963); *Hunt* v. *Page*, 355 F.2d 169 (10th Cir. 1966); *Application of Boyd*, 189 F. Supp. 113 (1959). While this result produces obvious strain on the relationship of the federal and state systems, the court concludes that it must, if desired by petitioner, proceed on this single question.

Accordingly, such petition is ordered filed in forma pauperis and this being a pure question of law and no hearing being necessary, the petitioner and respondent are hereby directed to file briefs with the court on the constitutional question of the validity of Georgia Code § 26-6303 within ten (10) days.

IT IS SO ORDERED.

This the 4th day of March, 1969.

/s/ SIDNEY O. SMITH, JR.

SIDNEY O. SMITH, JR.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action Number 12511

[Filed July 8, 1969]

JOHNNY C. WILSON

vs.

MILLARD GOODING, Warden of the Richmond County, Georgia, Public Works Camp

ORDER

In this writ of habeas corpus petitioner seeks to set aside his conviction on a number of grounds. The Court, in an order dated March 4, 1969, concluded that petitioner had not exhausted his available state remedies as to contentions raised in paragraphs 6b, 7, 8, and 9 of the writ. The Court concluded that petitioner had exhausted his remedies as to the contention raised in paragraphs 5 and 6(a), attacking his conviction on the grounds of the alleged unconstitutionality of Georgia Code § 26-6303. The Court also concluded that petitioner's failure to utilize a direct appeal to the United States Supreme Court under 28 U.S.C. § 1257 did not constitute a bar to this proceeding. Accordingly, this order will not deal with the alleged unconstitutional application of this statute nor any of the other points raised in the writ, except for the facial unconstitutionality of Georgia Code § 26-6303.

Georgia Code § 26-6303 provides in relevant part:

> Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor.

The question of constitutionality of this statute is exceedingly complex and difficult. None of the reported cases that have come to this Court's attention have dealt with the precise issues presented herein, yet many cases have dealt with at least some aspects of the instant statute. First Amendment rights have assumed a protected place in our jurisprudence. Great care must be taken in this area to assure that vague or overbroad laws do not infringe upon these rights. See, *e.g.*, Ashton v. Kentucky, 384 U. S. 195 (1966); Dombrowski v. Pfister, 380 U. S. 479 (1965). Since speech is normally intended to change the opinions or reinforce the opinions of others, problems arise as to the extent to which mere speech may be curbed when it provokes others into action. The cases reflect the view that peaceful expression of even unpopular views is permitted and even encouraged.

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . .

Terminiello v. Chicago, 337 U. S. 1, 4-5 (1948). In a recent decision the Supreme Court has taken a further step in elaborating upon the above language.

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing lawless action and is likely to incite or produce such action. As was said in

> Noto v. United States, 367 U. S. 290, 297-298 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. See also Herndon v. Lowry, 301 U. S. 242, 259-261 (1937); Bond v. Floyd, 385 U. S. 116, 134 (1966).

This decision in Brandenburg v. State of Ohio, 37 U.S.L.W. 4525 (June 9, 1969) logically followed from the Court's earlier decisions in Yates v. United States, 354 U. S. 298 (1957); DeJonge v. Oregon, 299 U. S. 353 (1937); Stromberg v. California, 283 U. S. 359 (1931). But a speaker passes the bounds of argument and persuasion and undertakes incitement to riot. See, *e.g.*, Feiner v. New York, 340 U. S. 315 at 321 (1950). The above distinction, while easily stated, is not so easily applied to a given factual situation. What is clear, however, is the fact that the Supreme Court will not allow intrusions into this protected area.

> For standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

N.A.A.C.P. v. Button, 371 U. S. 415 at 432-33 (1963). Thus, in *Ashton* v. *Kentucky*, *supra*, the Court struck down a statute prohibiting ". . . any writing calculated to create disturbances of the peace. . . ." In Terminiello v. Chicago, 337 U. S. 1 (1949), the Court struck down an ordinance forbidding any "breach of the peace" where the trial judge instructed the jury that any misbehavior which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance" violated the ordinance. Clearly, a statute may not involve "calculations as to the boiling point of a particular person or a particular group," but must involve "an appraisal of the nature of the comments *per se*." *Ashton*

v. *Kentucky*, *supra* at 200. Numerous other decisions have overturned breach of the peace statutes and related statute where the offense was improperly or imprecisely defined. See, *e.g.*, Edwards v. South Carolina, 372 U. S. 229 (1963); Cox v. Louisiana, 379 U. S. 536 (1965); Hunter v. Allen, 286 F. Supp. 830 (N.D.Ga. 1968); University Committee to End The War In Viet Nam v. Gunn, 289 F. Supp. 469 (W.D. Tex. 1968); Baker v. Bindner, 274 F. Supp. 658 (W.D.Ky. 1967); Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967); Carmichael v. Allen, 267 F. Supp. (N.D.Ga. 1967).[1]

Having generalized as to the legal background in this area, the Court is now faced with a decision as to the constitutionality of Georgia Code § 26-6303. Defendant argues that the phrases "opprobrious words" and "abusive language" have a well defined meaning in the Georgia law and are not so broad as to impinge upon protected areas. In construing this code section the Courts have held that the words of the enactment are to be taken in their ordinary signification. Stevenson v. State, 90 Ga. 456 (1892). The Georgia Courts have definitely established grimaces or facial expressions of contempt do not constitute "opprobrious words or abusive language."

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[1] In *Carmichael*, *supra*, the Court noted:

> . . . [I]t takes no elaboration to demonstrate that the term "vulgar" in connection with "language", and the use of the term "tending to disturb the good order, morals, . . . or dignity of the City" leaves "the executive and judicial branches too wide a discretion in the application" of the law. It too readily permits them to make a crime out of what is protected activity.

Id. at 998-99.

In *Hunter* v. *Allen*, *supra*, while commenting upon Atlanta's disorderly conduct statute, the Court observed:

> In short, the standards are overwhelmingly subjective. What is an "angry threat"? What is "abusive" conduct? What is "roughly crowding"? What is a "dangerous manner"? The reaction of some unknown third party could determine the guilt or innocence of the accused.

Id. at 836.

Behling v. State, 110 Ga. 754 (1900). In Fisk v. State, 124 Ga. 416 (1905), the Court reversed a trial judge's instructions that as a matter of law certain words were opprobrious and abusive, stating that this as well as whether it was calculated to cause a breach of the peace were questions for the jury. This holding appears to be contrary to the holding of the Georgia court in the instant case that the words used by the petitioner were opprobrious and abusive per se. Again in Jackson v. State, 14 Ga. App. 19 (1913), the court stated that this was a question for the jury, but again failed to define these terms. The decision in Dillard v. State, 41 Ga. 278 (1870) deals only with the provision as to the use of obscene or vulgar language in the presence of a female. Thus, in the decisions brought to this Court's attention, no meaningful attempt has been made to limit or properly define these terms. Some courts have approved reference to a standard dictionary to define statutory terms. *E.g.*, United States v. String, 263 F. 789, 796 (W.D. Wash.). According to Webster's New International Dictionary (2d Ed. 1941), opprobrious means: "Expressive of opprobrium; attaching disgrace; reproachful; scurrilous . . ." Synonyms include "disgraceful, abusive, insulting, offensive." The same work lists as synonyms for insulting, the terms "insolent and offensive." Thus, in the dictionary sense of these phrases, they both include the words that are offensive, thus arguably encroaching upon the mandates of *Brandenburg, supra, Ashton, supra,* and *Terminiello, supra.* There is dicta in Cantwell v. Connecticut, 310 U. S. 296 (1940) that certain epithets, profane and indecent in nature, would not be protected. The case of Chaplinsky v. New Hampshire, 315 U. S. 568 (1942) suggests that "fighting words" may result in punishment.[2] Moreover, this Court does not see any

[2] However, the higher courts have thus far failed to provide a precise standard themselves. Such expression is needed if the lower courts are to be continually called upon to inquire into the validity

policy reasons for upholding the right of a person to use the type of language expressed by this petitioner. It strains the concept of freedom of speech out of proportion when it is argued that such language is and should be protected. However, this consideration is really not relevant to the present inquiry, except to suggest that a narrowly and precisely defined statute could have reached this sort of speech. The fault of the statute is that it leaves wide open the standard of responsibility, so that it is easily susceptible to improper application. The State argues that the statute is saved by the adding requirement of "tending to breach the peace." This is a persuasive argument until one reads the decision in *Ashton* v. *Kentucky*, *supra*, wherein the Court states in reference to *Edwards* v. *South Carolina*, *supra* and *Cox* v. *Louisiana*, *supra*:

> These decisions recognize that to make an offense of conduct which is "calculated to create disturbances of the peace" leaves wide open the standard of responsibility.

Id. at 200. Moreover in *Cox* v. *Louisiana*, *supra*, at 551, the Court struck down as unconstitutionally vague and broad a statute including as an element the congregating with others "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned." As construed by the Georgia courts, especially in the instant case, the Georgia provision as to breach of the peace is even broader than the Louisiana statute.

Thus, the Court must conclude that Georgia Code 26-6303 is unconstitutionally vague and broad, and the conviction therefor is set aside.

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of similar state statutes and local ordinances. Cantwell v. Connecticut, 310 U. S. 296 (1940) gives the most likely basis, insofar as it is still valid.

That portion of defendant's confinement attributable to a conviction under this statute must necessarily fall.

IT IS SO ORDERED.

This the 7th day of July, 1969.

/s/ SIDNEY O. SMITH, JR.

SIDNEY O. SMITH, JR.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 12511

JOHNNY C. WILSON

vs.

MILLARD GOODING, Warden of the Richmond County, Georgia, Public Works Camp

JUDGMENT

The Court, Honorable Sidney O. Smith, Jr., United States District Judge, by order of this date having granted the petition for writ of habeas corpus, ruling Georgia Code 26-6303 is unconstitutionally vague and broad, and the conviction therefor is set aside, and that portion of defendant's confinement attributable to a conviction under this statute must necessarily fall,

JUDGMENT is hereby entered in favor of the petitioner and against respondent.

Dated at Atlanta, Georgia, this July 8, 1969.

CLAUDE L. GOZA
Clerk

By: /s/ RUTH M. STILLWELL
Deputy Clerk

Filed and entered in
Clerk's Office
this July 8, 1969
CLAUDE L. GOZA
Clerk

By: /s/ RUTH M. STILLWELL
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 28274

JOHNNY C. WILSON,
Petitioner-Appellee,

versus

MILLARD GOODING, Warden, Richmond County Public Works Camp, Richmond County, Georgia,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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(August 19, 1970)

Before SIMPSON, MORGAN, and INGRAHAM, Circuit Judges

INGRAHAM, Circuit Judge: Petitioner-Appellee Wilson was indicted and convicted in Superior Court of Fulton County, Georgia, on two counts of assault and battery, and two counts of using opprobrious and abusive language,[1] the latter in violation of Georgia Code § 26-6303.[2]

[1] On Counts 1 and 2, appellee received consecutive 12 month sentences for committing assault and battery on each of two police officers. He received an additional sentence of 12 months on counts 3 and 4 for using opprobrious and abusive language to each officer. The sentence on count 4 was to run concurrently with that of count 3, and thus appellees total prison term for the state prosecution was to be 36 months.

[2] § 26-6303 of the Code of Georgia (1933) provides that:

"Any person who shall, without provocation, use to or of another, and in his presence, or by telephone, opprobrious words

Appellee filed a petition for a writ of habeas corpus in the federal district court, pursuant to 28 U.S.C. § 2254. Among other claims, he alleged that § 26-6303 was unconstitutional on its face under the First and Fourteenth Amendments because of its vagueness and overbreadth. The district court, in an order dated March 4, 1969, dismissed all of appellee's habeas corpus claims with the exception of the question involving § 26-6303, it appearing that state remedies had not been exhausted. The question of the facial constitutionality of § 26-6303, however, had previously been before the Georgia Supreme Court,[3] obviating the need to exhaust state remedies on that matter.[4]

In a subsequent order entered on July 8, 1969, the district court held § 26-6303 unconstitutional on its face and ordered the release of appellee from that portion of his confinement attributable to his conviction under the statute. *Wilson* v. *Gooding*, 303 F.Supp. 952 (N.D.Ga. 1969). Appellants, Millard Gooding and the State of Georgia, in seeking reversal of this judgment and order, raise the following two issues:

I. Did the district court err by failing to request a three-judge court pursuant to 28 U.S.C. § 2281 when an application for a writ of habeas corpus raises a substantial question of the constitutionality of a state statute?

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or abusive language, tending to cause a breach of the peace, or who shall, in like manner use obscene and vulgar or profane language in the presence of, or by telephone to, a female, or any person who shall communicate to any virtuous female within this State by writing or printing any obscene or vulgar language or improper proposals, or by indecent or disorderly conduct in the presence of females on passenger cars, street cars, or other places of like character shall be guilty of a misdemeanor."

[3] Wilson v. State, 223 Ga. 531, —— S.E.2d —— (1967).

[4] The district court's order called for briefs to be submitted on the constitutional issue, and at this point the State of Georgia entered the case as amicus curiae.

II. Did the district court err in holding § 26-6303 unconstitutionally vague and overbroad on its face and as interpreted by the Georgia courts?

I.

The first issue involves a possible conflict between habeas corpus and three-judge court jurisdiction under § 2281.[5] It is well recognized that there are four essential requirements for the application of § 2281: "(1) a state statute must be challenged; (2) a state officer or local officer performing a state function must be a party defendant; (3) injunctive relief must be sought; (4) it must be claimed that the statute is contrary to the Constitution." *Gilhool* v. *Chairman & Com'rs, Philadelphia Co. Bd. of Elections*, 306 F.Supp. 1202, 1205 n.2 (E.D. Pa. 1969), *aff'd*, 397 U.S. 147 (1970); C. Wright, Federal Courts § 50, at 189 (2d ed. 1970). See also *Hall* v. *Garson*, —— F.2d ——, —— (5th Cir. 1970, No. 29690, July 22, 1970, at 25). Although there is no problem in the case sub judice with requirements (1), (2) and (4), there was no prayer for injunctive relief. Appellants, however, argue that in substance, if not in form, all four requisites have been met because the effect of holding § 26-6303 unconstitutional was to enjoin a state officer from enforcing a state statute.

In sum, appellants are calling for a liberal construction of § 2281. The Supreme Court, however, has re-

[5] "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

28 U.S.C.A. § 2281

peatedly warned that the three-judge court legislation is not "a measure of broad social policy to be construed with great liberality," but rather "an enactment technical in the strict sense of the word and to be applied as such." *Phillips* v. *United States*, 312 U.S. 246, 251 (1941). See *Mitchell* v. *Donovan*, —— U.S. —— (1970) [38 U.S.L.W. 4514, June 15, 1970]; *Hall* v. *Garson*, *supra*. The Court has also taken the position that under the analogous provisions of 28 U.S.C. § 2282, dealing with federal statutes, when plaintiffs merely attack the validity of legislation without also ". . . affirmatively [seeking] to interdict the operation of a statutory scheme," a single district judge alone must hear the case. *Flemming* v. *Nestor*, 363 U.S. 603, 607 (1960). See *Mitchell* v. *Donovan*, *supra*; *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 153-55 (1963).[*]

The specific question raised by appellants is whether a single district court judge has jurisdiction to pass upon the constitutionality of a state statute in a habeas corpus proceeding in view of the requirement for a three-judge court under § 2281. To our knowledge, there has been no discussion of this particular issue beyond the district court level. The majority of lower courts, however, have followed the view that § 2281 has no relation to habeas corpus proceedings and thus that a single judge is sufficient. *United States* v. *York*, 281 F.Supp. 8, 12 (D.C. Conn. 1968); *McCarrol* v. *Faust*, 278 F. Supp. 448, 450 (E.D.La. 1968); *United States* v. *Warden of Wallkill Prison*, 246 F.Supp. 72, 92 n.16 (S.D.N.Y. 1965), *aff'd*, 355 F.2d 208 (2d Cir. 1966); *United States* v. *Commonwealth of Pennsylvania*, 214 F.Supp. 913 (W.D.Pa. 1963); *United States* v. *Warden of Clinton Prison*, 29

[*] In these cases the Court refused to equate suits for a declaratory judgment with suits for injunctive relief. In the case at bar, no injunction was sought or granted barring prosecution of other persons by Georgia authorities under Georgia Code § 26-6303.

F.Supp. 486, 489 (N.D.N.Y. 1939), *aff'd*, 108 F.2d 861 (2d Cir. 1940), *cert. denied*, 309 U.S. 661 (1940).[7]

The question we face is actually a matter of balancing values, for we must make a choice betwen judicial economy and federal-state comity. We recognize that the passage of § 2281 was motivated by "the indignity and injustice which it was felt was being done to the states in having their solemn legislative acts, and the efforts of state officers to enforce them, impeded, perhaps frustrated, by the interlocutory fiat of a single judge. . . ." Hutcheson, *A Case for Three Judges*, 47 Harv. L. Rev. 795, 804 (1934). However, a particular state prisoner, such as appellee Wilson, in seeking discharge from prison on the grounds of conviction under an unconstitutional statute, does not threaten to frustrate the operation or existence of state government. Despite the many applications for habeas corpus, it is very seldom that a federal district judge orders the release of a prisoner the state has convicted. C. Wright, *supra*, § 50, at 217. On the other hand, the number of applications is increasing rapidly. To require a three-judge court for every case similar to the instant proceedings would place an unacceptable burden on the federal judiciary.[8]

The convening of a three-judge court is an extraordinary procedure which in itself imposes a burden on

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[7] Appellants assert that most of these cases rely on the *Clinton* case for authority, even though it merely indicates that "a single District Court Judge *seems* to have jurisdiction." 29 F.Supp. at 489 (emphasis added). However, the more recent opinions cited above are very definite in stating that a three-judge court is not necessary when the constitutionality of a state statute is attacked on a petition for federal habeas corpus. This is indicative of the trend that these lower federal courts have followed.

[8] The Judicial Conference of the United States in 1959 endorsed a proposal calling for a three-judge court for habeas corpus applications, but it retreated from this position in 1965 in realization of the troublesome burden that would result. C. Wright, *supra*, § 53, at 218. See Ann. Rep. of the Judicial Conference of the United States, 1965, at 83.

our federal court system. The summoning of another district judge and a circuit court judge may often result in a delay in matters needing immediate attention. *Allen* v. *State Board of Elections*, 393 U.S. 544, 561 (1969); *Swift & Co.* v. *Wickham*, 382 U.S. 111, 128 (1965). The direct appeal provision deprives the Supreme Court of often crucial adjudications by the courts of appeals, and thus the Court has called for utmost caution in any attempts at extention of the procedure. *Allen* v. *State Board of Elections*, *supra*, at 562; *Swift & Co.* v. *Wickham*, *supra*; *Oklahoma Gas & Elec. Co.* v. *Oklahoma Packing Co.*, 292 U.S. 386, 391 (1934).

After considerable reflection, it is our opinion that the district court's assumption of habeas corpus jurisdiction in the case sub judice should be upheld. Appellants' proposed liberal construction of § 2281 would turn the three-judge court into a habeas corpus panel. In the interest of judicial economy, a strict construction is necessary and thus there is no § 2281 jurisdiction.

II.

After careful independent examination of the constitutionality of Georgia Code § 26-6303 and its interpretation by the Georgia courts, we find that the opinion-order of the district court, *Wilson* v. *Gooding*, 303 F.Supp. 952 (N.D.Ga. 1969), carefully and fully delineates the reasons for holding § 26-6303 unconstitutionally vague and overbroad. We agree with the well reasoned opinion of the district court and its judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

No. 28274

D. C. Docket No. CA 12511

JOHNNY C. WILSON,
Petitioner-Appellee,

versus

MILLARD GOODING, Warden, Richmond County Public Works Camp, Richmond County, Georgia,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

Before SIMPSON, MORGAN, and INGRAHAM, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that respondent-appellant pay to petitioner-appellee, the costs on appeal to be taxed by the Clerk of this Court.

August 19, 1970

Issued As Mandate: Jan. 12, 1971.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 17 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~867~~ 70-26

MILLARD GOODING, Warden
of the Richmond County,
Georgia Public Works Camp,
Appellant,

v.

JOHNNY C. WILSON,
Appellee.

On Appeal from the United States Court of Appeals
for the Fifth Circuit

JURISDICTIONAL STATEMENT

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. _____

MILLARD GOODING, Warden
of the Richmond County,
Georgia Public Works Camp,

Appellant,

v.

JOHNNY C. WILSON,

Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is at this time unreported. It is set forth in Appendix A, pp. 1a *et seq.*

The opinion of the United States District Court for the Northern District of Georgia is reported at 303 F.Supp. 952. It is set forth in Appendix B, pp. 1b *et seq.*

JURISDICTION

This suit was originally commenced in the United States District Court by a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 et seq. seeking to set aside the appellee's State-court conviction. The appellant relied upon a State statute in support of his contention that the restraint imposed by him upon the appellee's liberty was not in violation of the Constitution, treaties or laws of the United States. The District Court entered an order on July 8, 1969 in favor of the appellee and based entirely upon the District Court's determination that the State statute upon which the appellant relied was invalid as repugnant to the Constitution. The decision of the District Court was appealed to the United States Court of Appeals for the Fifth Circuit, which on August 19, 1970, entered a judgment affirming the judgment of the District Court. A notice of appeal to this Court was filed in the Court of Appeals on September 3, 1970. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. § 1254.

QUESTION PRESENTED

Whether a State statute proscribing the unprovoked use to or of another person, and in the other person's presence, of opprobrious words or abusive language tending to cause a breach of the peace is unconstitutional for vagueness and overbreadth.

STATUTES INVOLVED

Georgia Code § 26-1409 (1933) and Ga. Code § 26-6303 (1933) are set forth in Appendix C, p. 1c.

STATEMENT OF THE CASE

Section 26-6303 of the Code of Georgia (1933) provides that:

> "Any person who shall, without provocation, use to or of another, and in his presence, opprobrious words or abusive language, tending to cause a breach of the peace, or who shall, in like manner, use obscene and vulgar or profane language in the presence of a female, or any person who shall communicate to any virtuous female within this State by writing or printing any obscene or vulgar language or improper proposals, or by indecent or disorderly conduct in the presence of females on passenger cars, streetcars, or other places of like character, shall be guilty of a misdemeanor."

The appellee was convicted of the unprovoked use to another, in the other's presence, of opprobrious words or abusive language tending to cause a breach of the peace.

The petitioner's application set out, among other things, the following claim for relief:

> "5. Ga. Code Ann. § 26-6303, under which petitioner was convicted on counts 3 and 4 of the indictment is on its face unconstitutionally vague and overbroad in violation of the first amendment and due process clause of the fourteenth amendment, it failing to apprize persons with sufficient particularity of the conduct which is sought to be prohibited and, by its excessive breadth, prohibiting activity protected by the first amendment. . . .
>
> "6. Ga. Code Ann. § 26-6303 is unconstitutionally vague and overbroad in violation of the first amendment and due process and equal protection clauses of the fourteenth amendment as applied to petitioner in the following respects:

> (a) Neither the case law of the State of Georgia, the trial court, nor the Supreme Court of Georgia defined the words 'opprobrious words or abusive language,' thereby leaving the determination of petitioner's guilt to the discretion fo (sic) the jury without adequate asfeguards (sic) of petitioner's due process right of notice or first amendment right of freedom of speech." Petition for Writ of Habeas Corpus, pp. 2-3, Record 2-3.

The District Court construed the attack upon Ga. Code Ann. § 26-6303 a private, unofficial, copyrighted publication, as an attack upon the constitutionality of Ga. Code § 26-6303 (1933), and limited the scope of its inquiry to the facial constitutionality of this statute. (Order dated Mar. 4, 1969; Record 326-27). By order dated July 7 or 8, 1969, and entered July 8, 1969, the District Court declared the criminal statute in question to be unconstitutionally vague and overly broad. (Record 364-71).

A notice of appeal to the United States Court of Appeals was filed in the District Court on July 11, 1969, and a protective notice of appeal to this Court was filed in the District Court on July 17, 1969. This latter appeal was dismissed for want of jurisdiction on December 8, 1969. By judgment dated and entered August 19, 1970, the Court of Appeals affirmed the judgment of the District Court declaring the criminal statute in question to be unconstitutionally vague and overly broad.

THE QUESTION IS SUBSTANTIAL

1. A STATE CRIMINAL STATUTE PROSCRIBING THE UNPROVOKED USE TO OR OF ANOTHER PERSON, AND IN THE OTHER PERSON'S PRESENCE, OF OPPROBRIOUS WORDS OR ABUSIVE LANGUAGE TENDING TO CAUSE A BREACH OF THE PEACE IS NOT UNCONSTITUTIONAL FOR VAGUENESS OR OVERBREADTH.

The appellee, Wilson, in his application chose to launch an attack upon the constitutionality of a state statute based on alleged vagueness *and* overbreadth. While recognizing that this is now the commonly accepted mode for mounting constitutional offensives, the appellant submits that the concept of overbreadth is more properly addressed to the first-amendment protections while the concept of vagueness is a due-process consideration. Practice does not make perfect, and constitutional concepts would seem to be equally entitled to the integrity of their individual identities. This is especially true when the concepts are separately written upon the body of the Constitution by separate amendments entered at different times. Absent such a separation, sound analytical application of constitutional principles and concepts is ofttimes impossible. Unfortunately, the opinion which accompanied the order of the court below made no attempt to distinguish between the two concepts. Consequently, the matter of the alleged vagueness of the statute will necessarily have to be treated together with the alleged first-amendment deficiency. At the same time, the appellant requests the Court to consider the fact that two separate, important principles are involved.

Georgia Code § 26-6303 (1933) does not infringe

upon or restrict protected speech; that portion of the section herein involved is a simple criminal statute directly related to that body of the law which defines and punishes the offense of assault and battery. Georgia Code § 26-1409 (1933) provides as follows:

> "On the trial of an indictment for an assault, or an assault and battery, the defendant may give in evidence to the jury any opprobrious words, or abusive language, used by the prosecutor, or person assaulted or beaten; and such words and language may or may not amount to a justification, according to the nature and extent of the battery, all of which shall be determined by the jury."

The obvious design of the statutory scheme is to avoid personal violence and not to regulate public speech. A fair reading of the statute under attack indicates that it prohibits nothing more than the use of opprobrious and abusive words under circumstances which tend to cause shootings, stabbings, fisticuffs, and common affrays. It prohibits persons from engaging in conduct which constitutes a justification for a simple assault and battery. As such, it is not a political statute. Its provisions are not so broad as to prohibit or infringe upon even the most flaming political argument or debate, the object of which is to quicken the sense of the hearer and to move him to engage in a protracted expression of his own political philosophy.

The appellant recognizes that some statutes, notably those directed toward the control of political activity and advocacy, have been found to be unconstitutional where they have attempted to proscribe and make punishable the exchange of ideas and the advocacy without overt act of unlawful conduct. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). These statutes, and the cases

involving them, have been uniformly concerned with conduct which is political and which is embraced within the first amendment. Other decisions have dealt with situations where statutes have proscribed conduct broadly so as to sweep within the coverage of the statutory proscriptions conduct within the protection of the first amendment. *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964). Unfortunately, some of these decisions are accompanied by opinions couched in the language of due process and touching upon the void-for-vagueness doctrine; however, it is submitted that the thread of constitutional infirmity which links these decisions, and others of similar import, is the fact that the statute involved attempted to over-regulate protected first-amendment conduct. The question of overbreadth is truly a first-amendment question—one which can only be resolved by ascertaining the limitations of the proscription on conduct which the statute under attack sets forth and comparing this ascertained proscription with the protected areas of conduct.

The first amendment was not intended, and is not applied, to protect all speech, i.e., all verbal exercises. This is the clear, obvious teaching of the division between the Supreme Court majority and the concurring opinion writers in *Brandenburg v. Ohio*, *supra*. In fact, at the same time, there appears to be universal agreement that a major, if not the major, purpose of the first amendment is "to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214 (1966). It has been repeatedly recognized that the commitment of the first amendment is to the protection of the ex-

change of political and social ideas. Certain federal statutes which totally and absolutely prohibit speech in various forms have withstood assault launched from first-amendment bases. *Truchinski v. United States*, 393 F.2d 627 (8th Cir. 1968); *Spinelli v United States*, 382 F.2d 871 (6th Cir. 1967); *Katz v. United States*, 369 F.2d 130 (9th Cir. 1966), *rev'd other grounds*, 389 U. S. 347 (1967); *United States v. Corallo*, 281 F.Supp. 24 (S.D.N.Y. 1968); *United States v. Kelly*, 254 F.Supp. 9 (S.D.N.Y. 1966); *United States v. Borgese*, 235 F.Supp. 286 (S.D.N.Y. 1964).

This Court has proclaimed on numerous occasions that freedom of speech is concerned with political and social exchanges, and the Court has expressly held that "the central commitment of the first amendment . . . is that 'debate on public issues should be uninhibited, robust, and wide open.' " *Bond v. Floyd*, 385 U.S. 116 (1966). An identical view of the first amendment is expressed in an earlier case holding that "the first amendment envisions that persons be given the opportunity to inform the community of both sides of the issues. . . ." *Wood v. Georgia*, 370 U.S. 375 (1962). The same factor is implicit in the Court's decision in *Brandenburg v. Ohio, supra*, and the cases therein cited.

Freedom of speech is not an absolute right. *Cox v. Louisiana*, 379 U.S. 559 (1965).

> "The Constitution does not establish an absolute right to free expression of ideas, though some might disagree. The constitutional right to free exercise of speech, press, assembly, and religion may be infringed by the State if there are compelling reasons to do so." *Ferrell v. Dallas Independent School Dist.*, 392 F.2d 697, 702 (5th Cir. 1968).

In declaring that obscenity is not protected by the first amendment, this Court held that:

> "The unconditional phrasing of the first amendment was not intended to protect every utterance. . . . The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 483-84 (1957).

Even the *Roth* dissenters expressed the thought that "freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it." *Id.* at 514. Cf. *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961).

At this point, it seems proper to stop and examine again the Georgia statute under attack and to note, by a process of exclusion, what it does not purport to make punishable. It does not seek to punish the advocacy of an idea. *Brandenburg v. Ohio, supra.* The statute as drafted leaves one free to use abusive and opprobrious language to advocate the violent overthrow of our system of government, if that be the person's desire. It does not apply to abusive or opprobrious language utilized in the mere abstract teaching of the moral propriety or necessity for a resort to force and violence to effect political and/or social changes. It does not attempt to affect the mass dissemination of ideas by media or printed matter. A person is free, if that be his desire, to use opprobrious and abusive language in describing another person not in the presence of the person so described. The speaker may even use opprobrious and abusive language to or about another person in his presence provided, of course, that the use of the language

under the circumstances does not tend to a breach of the peace. As viewed, the statute is not designed to regulate social or political commentary and activity.

The first amendment protects the freedom of assembly; however, it does not protect assemblage which is incidental to, and a part of, a punishable conspiracy. In the present case, we are concerned with the statute which on its face does not attempt to regulate advocacy, instigation or incitation. Rather, it deals solely with face-to-face provocation. The appellant submits that the first amendment's protection of free speech was never intended to clothe a person in immunity who by use of words to and in the face of another person intentionally provokes that other person to acts of violence *against* the speaker. Such an extension of the first amendment would not be in line with ordered concepts of civilized democracy; rather, it would necessarily tend toward a disorderly, bawdy and violent social structure.

The States have a legitimate interest in prohibiting the use of abusive and opprobrious words which tend to provoke violent, immediate, physical affrays. The common need of all citizens, including those who desire to engage in peaceful expressions of their political views, to live in a society in which free and robust political debate is a meaningful concept is a compelling reason, within the meaning of the Fifth Circuit's decision in *Ferrell, supra*, for the States to restrict the use of abrasive language which tends to provoke others to the commission of immediate, physical violence. Stirring the listener to action by a heated debate, a coolly logical speech, or even a wildly emotional harangue is an acceptable practice and a constitutionally protected right. But, deliberate provocation of killing or violence—acts

to which the Georgia statute is addressed—has not enjoyed historical acceptance in this country. Even debate or speech-making, designed to move the listener to constructive, albeit loud, political action cannot survive in a community which is impotent to prevent a man from deliberately triggering physical outbursts.

An examination of the Supreme Court's opinion in *Brandenburg v. Ohio, supra,* will furnish a very adequate vehicle for illustrating the operation of the statute under attack. In footnote 1 of the Court's per curiam opinion there were set forth various phrases derogatory of negroes and Jews. According to the opinion, these phrases were clearly understandable from the sound track of a sound motion-picture film taken at a Ku Klux Klan rally in Ohio. This film had been introduced into evidence against the defendants who had staged the rally in a prosecution under the Ohio Criminal Syndicalism statute, Ohio Rev. Code ¶ 2923.13. By derivation, it is not difficult to imagine and picture the situation where any one of these phrases to be used in a direct face-to-face confrontation with an ordinary member of the class thereby degraded. The situation is not one then of mere advocacy of an idea nor the communication of thoughts. In such a circumstance the words, many of which are obviously opprobrious, and the language, much of which is clearly abusive, constitute a provocation to physical conflict. Under the laws of Georgia, as previously pointed out, they could well be found to constitute a justification for an assault by the demeaned person upon the speaker. The State of Georgia submits that the first amendment was never intended and has never been applied to negative the police power of the States to make punishable such deliberate provocations. There is simply nothing

in any majority opinion of the Supreme Court in the area of first-amendment rights which indicates that the States are helpless and powerless to proscribe what in effect amounts to a verbal assault.

The shaking of a fist by a speaker in the advocacy of an idea may under certain constructions of the first amendment be protected, symbolic free speech, but none of these theories would go so far as to say that the belligerent shaking of the fist under the nose of another person is not conduct which the States may punish. Yet, it is but a small step from the decision of the court below to a decision striking down simple assault statutes on the ground that they contravene the first amendment.

Additional support for the statute's constitutional validity can be found in the continuing vitality of the clear-and-present-danger limitation on first-amendment freedoms. *Brandenburg v. Ohio, supra.* It is possible that this limitation has by virtue of a footnote in the *Brandenburg* majority opinion been relabeled the "tendency to produce forcible action" limitation. *Brandenburg v. Ohio, supra* at 447, n. 2. In either case, the Georgia statute is within the limitation.

It is to be noted that the statute under attack does not proscribe the use of language tending to a breach of the peace; rather, it proscribes the use of such language *to and of another person and in his presence* tending to a breach of the peace. We only need to reimagine the illustrations conveyed by the *Brandenburg* decision to realize the extreme importance of this difference in testing the statute under the first amendment. Certainly, it cannot be said that the Georgia statute does anything more than proscribe language fully and completely re-

lated to its tendency to produce forcible action. Again, it is impossible to construe the Georgia statute as being applicable to the mere advocacy of an idea.

For these reasons, and in light of the foregoing discussion, the State of Georgia submits that its statute which the court below declared unconstitutional does not by its language breach protected first-amendment liberties. Provoking a fight, whether it be by "getting in the first lick" or by using abrasive language is criminal conduct. Criminal conduct per se does not enjoy first-amendment protection. While the Supreme Court has considered principally first-amendment rights in the context of political rights, the lower federal courts have had occasion to declare that the freedom-of-speech principle is inapplicable to per se criminal conduct. *United States v. Borgese, supra.* "While the first amendment provides freedom of speech, it does not guarantee or protect criminal conduct." *United States v. Smith,* 209 F.Supp. 907, 919 (E.D. Ill. 1962). The sweeping statements of these cases are not incompatible with standards enunciated by this Court.

The State of Georgia submits that provoking a fight is a common crime and that such provocations are not shrouded under the mantel of the first amendment. Provoking a blow with the fist or the retort of a pistol has never been, and should not now be, equated with provoking those mental processes which lead to a useful social and political change. The appellant submits that a careful reading of Ga. Code § 26-6303 reveals that the statute does not infringe upon constitutionally protected speech. It is simply a statute prohibiting the precipitation of unprotected, illegal physical violence. Therefore, the State submits that the statute is not overly broad,

as claimed by the appellee. There is no constitutional right to provoke and precipitate civil war, whether there be tens or hundreds of participants, or merely two individuals swinging their fists at one another.

2. A STATE STATUTE PROSCRIBING THE UNPROVOKED USE TO OR OF ANOTHER PERSON, AND IN THE OTHER PERSON'S PRESENCE, OF OPPROBRIOUS WORDS OR ABUSIVE LANGUAGE, AND INTERPRETED BY THE COURTS OF THE STATE AS PROHIBITING OPPROBRIOUS WORDS AND ABUSIVE LANGUAGE "LIKELY TO CAUSE A BREACH OF PEACE" OR "WHICH WOULD NATURALLY TEND TO CAUSE A BREACH OF PEACE UNDER ORDINARY CIRCUMSTANCES", IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS INTERPRETED BY THE COURTS OF THE STATE IN QUESTION.

While the constitutional cornerstones of alleged vagueness and overbreadth have been placed in close juxtaposition, the concepts represented by the two words are not necessarily allied, for a statute could employ words of precise and definite meaning to intrude upon an area substantively protected by the Constitution. On the other hand, a statute could employ vague and imprecise words raising procedural due-process questions, and still not be overly broad because of its lack of infringement upon a substantive constitutional provision.

A differentiation between the concepts of vagueness and overbreadth should be drawn in this case for two principal reasons. Firstly, the Georgia statute is neither

vague nor overly broad. Secondly, the two concepts are not mutually inclusive, and the doctrines represented should not be mingled and allowed a degree of interplay which would permit each of the diverse concepts to come in aid of the other.

Implicit in the appellee's claim of vagueness is the contention that he, as an individual of at least ordinary intelligence, cannot understand the statute, for "the concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *Landry v. Dailey,* 280 F.Supp. 938, 951 (E.D. Ill. 1968), appeal dismissed *Landry v. Boyle,* 393 U.S. 220 (1968).

The overbreadth claim necessarily rests upon a contention that the statute infringes upon a substantive right specifically granted by the Constitution. In drawing the distinctions between the legal concepts of vagueness and overbreadth, the three-judge court in *Landry, supra,* pointed out that "the concept of overbreadth . . . rests on principles of substantive due process which forbid the prohibition of certain individual freedoms." *Landry v. Dailey, supra* at 951. Having previously shown that the statute is not overly broad so as to prohibit substantively protected first-amendment exercises, the appellant now turns to the due-process claims, including the appellee's first-amendment "vagueness" claims.

The Georgia statute is plain on its face. As such, the statute does not really require judicial construction, as its meaning is clear without interpretation. In examining a statute, a court should accord it a normal and ordinary construction as indicated by the words employed by the legislative draftsmen. The standard to be used is

whether the statute gives "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss,* 340 U.S. 612, 617 (1953). The words employed in a statute generally have the meaning ordinarily ascribed them by "men of common intelligence." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 573 (1942). For an additional detailed discussion of this general area, see Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law,* 3 Vand.L.Rev. 531, 539-43 (1950).

In disposing of the alleged due process deficiencies in the statutes involved in the now famous *Roth* and *Alberts* obscenity cases, this Court held that

> "'. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct wwhen measured by *common understanding and practices. . . .*'" *Roth v. United States,* 354 U.S. 476, 491 (1957). (Emphasis added.)

Just as the citizens of the United States were held to recognize the conduct forbidden by the obscenity statutes involved in the *Roth* and *Alberts* cases, men of common understanding know, without being told by the General Assembly of Georgia, that the expression of some thoughts under particular circumstances is highly likely to produce a black eye or a broken nose. This obvious truth has received judicial recognition and application. *Chaplinsky v. New Hampshire, supra* at 573. The Georgia statute does not forbid "conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Baggett v. Bullitt, supra.* See also *Cramp v. Board of*

Public Instruction of Orange County, Florida, 368 U.S. 278, 7 L.Ed.2d 285 (1961).

The appellant submits that the statute more than adequately meets due-process requirements and that it is not overly broad. While this may be discerned from a reading of the statute, it is unnecessary to indulge in speculation concerning its application, as numerous cases have reached the appellate courts of Georgia requiring the application of Ga. Code § 26-6303. The standard, prevailing rule of statutory construction was early applied to the language of this section. *Stevenson v. State,* 90 Ga. 456, 458 (1892). Consequently, the phrase "opprobrious words or abusive language" is to be taken in the ordinary sense conveyed by the words.

In determining the ordinary sense of words, reference to a standard, accepted dictionary has been judicially approved. *United States v. Strong,* 263 F. 789, 796 (W.D. Wash.). Thus, "abusive" is synonymous with coarse, insulting words. Webster defines "abusive" as "given to or tending to abuse". "Abuse" is by Webster defined as "vituperative words; coarse, insulting speech; abusive language; virulent condemnation; reviling." The same authoritative source defines "opprobrious" as being expressive of opprobrium (reproach, disgrace, contempt, infamy, reprobation), as attaching disgrace, as being reproachful and/or scurrilous. Opprobrious language is disgraceful, abusive, insulting, offensive, scurrilous, gross and vulgar. Thus, opprobrious has been judicially defined as meaning reproachful, scurrilous, infamous. *Behling v. State,* 110 Ga. 754, 755 (1900); *Dillard v. State,* 41 Ga. 278, 281, 282 (1871). The term "abusive and opprobrious language" contemplates words conveying contempt and insult. *Behling v. State, supra.* Similar

definitive concepts have been applied in other states. See *Peters v. State,* 51 So. 952, 953 (Ala. 1910); *State v. Pope,* 96 A. 313, 314 (Conn. 1916); *People v. Sinclair,* 149 N.Y.Supp. 54 (Gen. Sess. 1914).

It is important to note that the Georgia statute under attack does not prohibit the use of abusive language and opprobrious words. Considerably more is required in order for conduct to become punishable under the statute. "Proof of the use of opprobrious words alone is not sufficient, without showing the circumstances or in any way proving want of provocation." *Fuller v. State,* 72 Ga. 213 (1883), approved *Hardin v. State,* 114 Ga. 58 (1901). See also *Fish v. State,* 124 Ga. 416 (1905).

> "We cannot think that the legislature was aiming solely at the words, without reference to the thoughts or idea the words are intended to convey. There is not a single word in the language, however coarse, low or vulgar, that may not be and is not often used to convey proper and decent ideas, and it is a mawkish and really an indelicate and immodest sensitiveness that blushes at a word which may be used obscenely, but which the occasion and the context shows not to be so used. Words get their point and meaning almost entirely from the time, place, circumstances and intent with which they are used, and it seems to us a very unfair interpretation of this clause of the Code to say, that it is directed simply against the use of certain words which are by common consent banished from decent society. If there are any such words in our language they are very few, and as we have said, they are only obscene and vulgar accordingly as they convey obscene and vulgar ideas.
>
> "This statute does not stand upon the footing of statutes against public indecency. Its object is not

> to keep pure the public morals. It is to be found in that chapter of the Code which punishes private wrongs, and *forms a part of the same clause which makes it a penal offense to use opprobrious and abusive language to another." Dillard v. State, supra* at 281. (Emphasis added.)

While this particular appellate decision dealt with a conviction for using obscene language to a female, it is clearly expressive of the uniform judicial construction which has been placed upon the entire section insofar as it proscribes various verbal expressions.

In every prosecution involving the statute under attack, a mixed question of fact and law is whether the alleged words were likely to cause a breach of the peace. *Jackson v. State,* 14 Ga. App. 19 (1913). Further, the statutory language relating to the tendency to breach of peace has been adequately construed by the Georgia courts so as to define the situation within which the use of abusive and opprobrious language, as commonly understood, is prohibited. *Elmore v. State,* 15 Ga. App. 461 (1914); *Jackson v. State, supra.* This portion of the statute has been construed as "likely to cause a breach of peace," or, in other words, language "which would naturally tend to cause a breach of peace under ordinary circumstances." *Ibid.*

In addition to the cases already cited, the statutory prohibition has been construed and applied to particular situations in a number of reported, appellate-level decisions. *Wiggins v. State,* 17 Ga. App. 748 (1916); *Porter v. State,* 86 Ga. 362 (1896); *Meaders v. State,* 96 Ga. 299 (1895); *Ratteree v. State,* 78 Ga. 335 (1886).

The thrust of these decisions illustrates the fact that, as construed by the Georgia courts, the statute in ques-

tion is not applied to regulate speech. It is not a statute enforcing any concept within the general view of public morals. Instead, it falls within the area of those statutes designed to further the State's domestic peace-keeping function. Under the statute as construed, a person is free to utilize abusive language and opprobrious words so long as he does not utilize those words in a contextual situation where, under ordinary circumstances, the natural effect of the language would be to cause a breach of the peace. Just as one is not free to cry "fire" falsely in a crowded theater, one is not free, however naturally coarse, abusive and opprobrious he might be, to use abusive language and opprobrious words to and of another, and in the other's presence, in a situation where, under normal and natural circumstances, a breach of the peace is thereby likely to be caused.

The appellant submits that the interpretations placed upon the statute by Georgia appellate courts adequately demonstrate the narrow range within which the statute operates. It is well to emphasize that as construed no less than four distinct elements must be present in order to sustain a conviction under the section in question. Firstly, there must be abusive language or opprobrious words, as the same is commonly understood. Secondly, these words or this language must be used to or of another person. Thirdly, the remarks must be made in the immediate, direct presence of the person either to whom it is addressed or of whom it has reference. Fourthly, the entire situation in which the words are spoken must, under normal circumstances, cause the conduct of speaking so as to make this conduct likely to cause a breach of the peace. Taken together these four elements outline a pro-

scription of provocative, assaultive conduct which it is clearly within the police power of the States to prohibit.

The latest decisions of this Court continue to reaffirm the proposition that first-amendment rights are related to political activities and not to mere criminal conduct. "Speech and press are, of course, to be free, so that *public matters can be discussed* with impunity." *Gregory v. Chicago*, 394 U.S. 111, 125 (1969), separate opinion. The Court recognizes that men's homes can be protected "from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown." *Gregory v. Chicago, supra* at 125 (JJ. Black and Douglas concurring). If the minds of men may be protected from the communication of "fears of the unknown", the appellant submits that there can be no question that overt and assertive offers of violence (constituting known fears) may be prohibited.

In dealing with Ohio's criminal syndicalism statute, the Supreme Court noted that the statute failed to distinguish between mere teaching of violence and "preparing a group for violent action and steeling it to such action." *Brandenburg v. Ohio, supra* at 448. In striking down the statute, the Court said that there was no narrowing State construction of the definition of the crime "in terms of mere advocacy not distinguished from incitement to imminent lawless action." *Id.* at 447. The *Brandenburg* Court said, in effect, that a statute may not forbid mere advocacy. That proposition is unquestioned. The Court did not leave the matter there. It said, at least inferentially, that a statute prohibiting speech which incites "to imminent lawless action" is permissible. The Georgia statute prohibits abusive and opprobrious speech

"tending to cause a breach of the peace". There is neither logical nor legal difference between the concepts represented by the words "tending to cause a breach of the peace" and "incitement to imminent lawless action".

The most recent case known to counsel involving the speech-violence concept—which is the heart of this case—is a prosecution undertaken in the District of Columbia in which the defendant was charged with using "profane * * * words under circumstances tending to breach of peace did congregate * * * and refuse to move on * * *." *Williams v. District of Columbia,* 419 F.2d 638 (D.C. Cir. 1969). The United States Court of Appeals for the District of Columbia Circuit, in reversing *en banc* a panel decision, held that the section of the District of Columbia Code "would not be invalid if the statutory prohibition against profane or obscene language in public were interpreted to require an additional element that the language be spoken in circumstances which *threaten a breach of the peace.* And for these purposes a breach of the peace is threatened either because the language creates a substantial risk of provoking violence, or because it is, under 'contemporary community standards' so grossly offensive to members of the public who actually overhear it as to amount to a nuisance." *Williams v. D. C., supra* at 646.

Although the accusation in the *Williams* case alleged that the words were spoken under circumstances tending to cause a breach of the peace, unfortunately, the District of Columbia Code did not include "tending to cause a breach of the peace" as an element of the offense. The draftsmen of Georgia's statute specifically included the words "tending to cause a breach of the peace" as an element of the Georgia offense.

Georgia's statute does not ensnare the political speaker. It simply and adequately prohibits the deliberate provocation of a fight. It is a simple criminal statute which, while it deals with verbal conduct, has no other reasonable nexus with the first amendment.

CONCLUSION

For each of the foregoing three reasons, the appellant submits that the decision of the court below holding Ga. Code § 26-6303 (1933) unconstitutionally vague and overbroad was in error and should be reversed.

It is submitted that the question presented by this appeal is substantial and is of public importance.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28274

JOHNNY C. WILSON,

Petitioner-Appellee,

versus

MILLARD GOODING, Warden, Richmond County Public Works Camp, Richmond County, Georgia,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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(August 19, 1970)

Before SIMPSON, MORGAN, and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge: Petitioner-Appellee Wilson was indicted and convicted in Superior Court of Fulton County, Georgia, on two counts of assault and

battery, and two counts of using opprobrious and abusive language,[1] the latter in violation of Georgia Code § 26-6303.[2] Appellee filed a petition for a writ of habeas corpus in the federal district court, pursuant to 28 U.S.C. § 2254. Among other claims, he alleged that § 26-6303 was unconstitutional on its face under the First and Fourteenth Amendments because of its vagueness and overbreadth. The district court, in an order dated March 4, 1969, dismissed all of appellee's habeas corpus claims with the exception of the question involving § 26-6303, it appearing that state remedies had not been exhausted. The question of the facial constitutionality of § 26-6303, however, had previously been before the Georgia Supreme Court,[3]

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[1]On Counts 1 and 2, appellee received consecutive 12 month sentences for committing assault and battery on each of two police officers. He received an additional sentence of 12 months on counts 3 and 4 for using opprobrious and abusive language to each officer. The sentence on count 4 was to run concurrently with that of count 3, and thus appellee's total prison term for the state prosecution was to be 36 months.

[2]§ 26-6303 of the Code of Georgia (1933) provides that:

> "Any person who shall, without provocation, use to or of another, and in his presence, or by telephone, opprobrious words or abusive language, tending to cause a breach of the peace, or who shall, in like manner use obscene and vulgar or profane language in the presence of, or by telephone to, a female, or any person who shall communicate to any virtuous female within this State by writing or printing any obscene or vulgar language or improper proposals, or by indecent or disorderly conduct in the presence of females on passenger cars, street cars, or other places of like character shall be guilty of a misdemeanor."

[3]Wilson v. State, 223 Ga. 531, ____ S.E.2d ____ (1967).

obviating the need to exhaust state remedies on that matter.[4]

In a subsequent order entered on July 8, 1969, the district court held § 26-6303 unconstitutional on its face and ordered the release of appellee from that portion of his confinement attributable to his conviction under the statute. *Wilson v. Gooding*, 303 F.Supp. 952 (N.D.Ga. 1969). Appellants, Millard Gooding and the State of Georgia, in seeking reversal of this judgment and order, raise the following two issues:

I. Did the district court err by failing to request a three-judge court pursuant to 28 U.S.C. § 2281 when an application for a writ of habeas corpus raises a substantial question of the constitutionality of a state statute?

II. Did the district court err in holding § 26-6303 unconstitutionally vague and overbroad on its face and as interpreted by the Georgia courts?

I.

The first issue involves a possible conflict between habeas corpus and three-judge court jurisdiction under § 2281.[5] It is well recognized that there are four es-

[4]The district court's order called for briefs to be submitted on the constitutional issue, and at this point the State of Georgia entered the case as amicus curiae.

[5] "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application

sential requirements for the application of § 2281: "(1) a state statute must be challenged; (2) a state officer or local officer performing a state function must be a party defendant; (3) injunctive relief must be sought; (4) it must be claimed that the statute is contrary to the Constitution." *Gilhool v. Chairman & Com'rs, Philadelphia Co. Bd. of Elections*, 306 F.Supp. 1202, 1205 n.2 (E.D.Pa. 1969), *aff'd*, 397 U.S. 147 (1970); C. Wright, Federal Courts § 50, at 189 (2d ed. 1970). See also *Hall v. Garson*, ... F.2d ....., ... (5th Cir. 1970, No. 29690, July 22, 1970, at 25). Although there is no problem in the case sub judice with requirements (1), (2) and (4), there was no prayer for injunctive relief. Appellants, however, argue that in substance, if not in form, all four requisites have been met because the effect of holding § 26-6303 unconstitutional was to enjoin a state officer from enforcing a state statute.

In sum, appellants are calling for a liberal construction of § 2281. The Supreme Court, however, has repeatedly warned that the three-judge court legislation is not "a measure of broad social policy to be construed with great liberality," but rather "an enactment technical in the strict sense of the word and to be applied as such." *Phillips v. United States*, 312 U.S. 246, 251 (1941). See *Mitchell v. Donovan*, ... U.S. ..... (1970) [38 U.S.L.W. 4514, June 15, 1970]; *Hall v. Garson, supra*. The Court has also taken the position that under the analogous provisions of 28 U.S.C. § 2282, dealing with federal statutes, when plaintiffs merely attack the validity of legislation without also ". . . affirmatively

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therefor is heard and determined by a district court of three judges under section 2284 of this title."

28 U.S.C.A. § 2281

[seeking] to interdict the operation of a statutory scheme," a single district judge alone must hear the case. *Flemming v. Nestor*, 363 U.S. 603, 607 (1960). See *Mitchell v. Donovan, supra; Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 153-55 (1963).[6]

The specific question raised by appellants is whether a single district court judge has jurisdiction to pass upon the constitutionality of a state statute in a habeas corpus proceeding in view of the requirement for a three-judge court under § 2281. To our knowledge, there has been no discussion of this particular issue beyond the district court level. The majority of lower courts, however, have followed the view that § 2281 has no relation to habeas corpus proceedings and thus that a single judge is sufficient. *United States v. York*, 281 F.Supp. 8, 12 (D.C. Conn. 1968); *McCarrol v. Faust*, 278 F. Supp. 448, 450 (E.D.La. 1968); *United States v. Warden of Wallkill Prison*, 246 F.Supp. 72, 92 n.16 (S.D.N.Y. 1965), *aff'd*, 355 F.2d 208 (2d Cir. 1966); *United States v. Commonwealth of Pennsylvania*, 214 F.Supp. 913 (W.D.Pa. 1963); *United States v. Warden of Clinton Prison*, 29 F.Supp. 486, 489 (N.D.N.Y. 1939), *aff'd* 108 F.2d 861 (2d Cir. 1940), *cert. denied*, 309 U.S. 661 (1940).[7]

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[6] In these cases the Court refused to equate suits for a declaratory judgment with suits for injunctive relief. In the case at bar, no injunction was sought or granted barring prosecution of other persons by Georgia authorities under Georgia Code § 26-6303.

[7] Appellants assert that most of these cases rely on the *Clinton* case for authority, even though it merely indicates that "a single District Court Judge *seems* to have jurisdiction." 29 F.Supp. at 489 (emphasis added). However, the more recent opinions cited above are very definite in stating that a three-judge court is not necessary when the constitutionality of a state statute is

The question we face is actually a matter of balancing values, for we must make a choice between judicial economy and federal-state comity. We recognize that the passage of § 2281 was motivated by "the indignity and injustice which it was felt was being done to the states in having their solemn legislative acts, and the efforts of state officers to enforce them, impeded, perhaps frustrated, by the interlocutory fiat of a single judge. . . ." Hutcheson, *A Case for Three Judges,* 47 Harv. L. Rev. 795, 804 (1934). However, a particular state prisoner, such as appellee Wilson, in seeking discharge from prison on the grounds of conviction under an unconstitutional statute, does not threaten to frustrate the operation or existence of state government. Despite the many applications for habeas corpus, it is very seldom that a federal district judge orders the release of a prisoner the state has convicted. C. Wright, *supra.* § 50, at 217. On the other hand, the number of applications is increasing rapidly. To require a three-judge court for every case similar to the instant proceedings would place an unacceptable burden on the federal judiciary.[8]

The convening of a three-judge court is an extraordinary procedure which in itself imposes a burden on our federal court system. The summoning of another district judge and a circuit court judge may often result in

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attacked on a petition for federal habeas corpus. This is indicative of the trend that these lower federal courts have followed.

[8]The Judicial Conference of the United States in 1959 endorsed a proposal calling for a three-judge court for habeas corpus applications, but it retreated from this position in 1965 in realization of the troublesome burden that would result. C. Wright, *supra,* § 53, at 218. See Ann. Rep. of the Judicial Conference of the United States, 1965, at 83.

a delay in matters needing immediate attention. *Allen v. State Board of Elections,* 393 U.S. 544, 561 (1969); *Swift & Co. v. Wickham,* 382 U.S. 111, 128 (1965). The direct appeal provision deprives the Supreme Court of often crucial adjudications by the courts of appeals, and thus the Court has called for utmost caution in any attempts at extension of the procedure. *Allen v. State Board of Elections, supra,* at 562; *Swift & Co. v. Wickham, supra; Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.,* 292 U.S. 386, 391 (1934).

After considerable reflection, it is our opinion that the district court's assumption of habeas corpus jurisdiction in the case sub judice should be upheld. Appellants' proposed liberal construction of § 2281 would turn the three-judge court into a habeas corpus panel. In the interest of judicial economy, a strict construction is necessary and thus there is no § 2281 jurisdiction.

II.

After careful independent examination of the constitutionality of Georgia Code § 26-6303 and its interpretation by the Georgia courts, we find that the opinion-order of the district court, *Wilson v. Gooding,* 303 F.Supp. 952 (N.D.Ga. 1969), carefully and fully delineates the reasons for holding § 26-6303 unconstitutionally vague and overbroad. We agree with the well reasoned opinion of the district court and its judgment is AFFIRMED.

APPENDIX B
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHNNY C. WILSON

vs.

MILLARD GOODING, Warden of the Richmond County, Georgia, Public Works Camp

CIVIL ACTION NUMBER 12511

In this writ of habeas corpus petitioner seeks to set aside his conviction on a number of grounds. The Court, in an order dated March 4, 1969, concluded that petitioner had not exhausted his available state remedies as to contentions raised in paragraphs 6b, 7, 8, and 9 of the writ. The Court concluded that petitioner had exhausted his remedies as to the contention raised in paragraphs 5 and 6(a), attacking his conviction on the grounds of the alleged unconstitutionality of Georgia Code §26-6303. The Court also concluded that petitioner's failure to utilize a direct appeal to the United States Supreme Court under 28 U.S.C. §1257 did not constitute a bar to this proceeding. Accordingly, this order will not deal with the alleged unconstitutional application of this statute nor any of the other points raised in the writ, except for the facial unconstitutionality of Georgia Code §26-6303.

Georgia Code §26-6303 provides in relevant part:

> Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor.

The question of constitutionality of this statute is exceedingly complex and difficult. None of the reported cases that have come to this Court's attention have dealt with the precise issues presented herein, yet many cases have dealt with at least some aspects of the instant statute. First Amendment rights have assumed a protected place in our jurisprudence. Great care must be taken in this area to assure that vague or overbroad laws do not infringe upon these rights. See, *e.g.*, Ashton v. Kentucky, 384 U.S. 195 (1966); Dombrowski v. Pfister, 380 U.S. 479 (1965). Since speech is normally intended to change the opinions or reinforce the opinions of others, problems arise as to the extent to which mere speech may be curbed when it provokes others into action. The cases reflect the view that peaceful expression of even unpopular views is permitted and even encouraged.

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . .

Terminiello v. Chicago, 337 U.S. 1, 4-5 (1948). In a recent decision the Supreme Court has taken a further step in elaborating upon the above language.

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or pro-

> scribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing lawless action and is likely to incite or produce such action. As was said in Noto v. United States, 367 U.S. 290, 297-298 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. See also Herndon v. Lowry, 301 U.S. 242, 259-261 (1937); Bond v. Floyd, 385 U.S. 116, 134 (1966).

This decision in Brandenburg v. State of Ohio, 37 U.S.L.W. 4525 (June 9, 1969) logically followed from the Court's earlier decisions in Yates v. United States, 354 U.S. 298 (1957); DeJonge v. Oregon, 299 U.S. 353 (1937); Stromberg v. California, 283 U.S. 359 (1931). But a speaker passes the bounds of argument and persuasion and undertakes incitement to riot. See, *e.g.*, Feiner v. New York, 340 U.S. 315 at 321 (1950). The above distinction, while easily stated, is not so easily applied to a given factual situation. What is clear, however, is the fact that the Supreme Court will not allow intrusions into this protected area.

> For standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

N.A.A.C.P. v. Button, 371 U.S. 415 at 432-33 (1963). Thus, in *Ashton v. Kentucky, supra,* the Court struck down a statute prohibiting ". . . any writing calculated to create disturbances of the peace. . . ." In Terminiello v. Chicago, 337 U.S. 1 (1949), the Court struck down an ordinance forbidding any "breach of the peace" where

the trial judge instructed the jury that any misbehavior which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance" violated the ordinance. Clearly, a statute may not involve "calculations as to the boiling point of a particular person or a particular group," but must involve "an appraisal of the nature of the commence *per se*." *Ashton v. Kentucky, supra* at 200. Numerous other decisions have overturned breach of the peace statutes and related statute where the offense was improperly or imprecisely defined. See, *e.g.*, Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); Hunter v. Allen, 286 F. Supp. 830 (N.D.Ga. 1968); University Committee to End The War In Viet Nam v. Gunn, 289 F. Supp. 469 (W.D. Tex. 1968); Baker v. Bindner, 274 F. Supp. 658 (W.D.Ky. 1967); Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1967).[1]

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[1]In *Carmichael, supra,* the Court noted:

> . . . [I]t takes no elaboration to demonstrate that the term "vulgar" in connection with "language", and the use of the term "tending to disturb the good order, morals, . . . or dignity of the City" leaves "the executive and judicial branches too wide a discretion in the application" of the law. It too readily permits them to make a crime out of what is protected activity.

Id. at 998-99.

In *Hunter v. Allen, supra,* while commenting upon Atlanta's disorderly conduct statute, the Court observed:

> In short, the standards are overwhelmingly subjective. What is an "angry threat"? What is "abusive" conduct? What is "roughly crowding"? What is a "dangerous manner"? The reaction of some unknown third party could determine the guilt or innocence of the accused.

Id. at 836.

Having generalized as to the legal background in this area, the Court is now faced with a decision as to the constitutionality of Georgia Code §26-6303. Defendant argues that the phrases "opprobrious words" and "abusive language" having a well defined meaning in the Georgia law and are not so broad as to impinge upon protected areas. In construing this code section the Courts have held that the words of the enactment are to be taken in their ordinary signification. Stevenson v. State, 90 Ga. 456 (1892). The Georgia Courts have definitely established grimaces or facial expressions of contempt do not constitute "opprobrious words or abusive language." Behling v. State, 110 Ga. 754 (1900). In Fisk v. State, 124 Ga. 416 (1905), the Court reversed a trial judge's instructions that as a matter of law certain words were opprobrious and abusive, stating that this as well as whether it was calculated to cause a breach of the peace were questions for the jury. This holding appears to be contrary to the holding of the Georgia court in the instant case that the words used by the petitioner were opprobrious and abusive per se. Again in Jackson v. State, 14 Ga. App. 19 (1913), the court stated that this was a question for the jury, but again failed to define these terms. The decision in Dillard v. State, 41 Ga. 278 (1870) deals only with the provision as to the use of obscene or vulgar language in the presence of a female. Thus, in the decisions brought to this Court's attention, no meaningful attempt has been made to limit or properly define these terms. Some courts have approved reference to a standard dictionary to define statutory terms. *E.g.*, United States v. String, 263 F. 789, 796 (W.D. Wash.) According to Webster's New International Dictionary (2d Ed. 1941), opprobrious means: "Expressive of opprobrium; attaching disgrace;

reproachful; scurrilous . . ." Synonyms include "disgraceful, abusive, insulting, offensive." The same work lists as synonyms for insulting, the terms "insolent and offensive." Thus, in the dictionary sense of these phrases, they both include the words that are offensive, thus arguably encroaching upon the mandates of *Brandenburg, supra, Ashton, supra,* and *Terminiello, supra.* There is dicta in Cantwell v. Connecticut, 310 U.S. 296 (1940) that certain epithets, profane and indecent in nature, would not be protected. The case of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) suggests that "fighting words" may result in punishment.[2] Moreover, this Court does not see any policy reasons for upholding the right of a person to use the type of language expressed by this petitioner. It strains the concept of freedom of speech out of proportion when it is argued that such language is and should be protected. However, this consideration is really not relevant to the present inquiry, except to suggest that a narrowly and precisely defined statute could have reached this sort of speech. The fault of the statute is that it leaves wide open the standard of responsibility, so that it is easily susceptible to improper application. The State argues that the statute is saved by the adding requirement of "tending to breach the peace." This is a persuasive argument until one reads the decision in *Ashton v. Kentucky, supra,* wherein the Court states in reference to *Edwards v. South Carolina, supra,* and *Cox v. Louisiana, supra:*

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[2]However, the higher courts have thus far failed to provide a precise standard themselves. Such expression is needed if the lower courts are to be continually called upon to inquire into the validity of similar state statutes and local ordinances. Cantwell v. Connecticut, 310 U.S. 296 (1940) gives the most likely basis, insofar as it is still valid.

> These decisions recognize that to make an offense of conduct which is "calculated to create disturbances of the peace" leaves wide open the standard of responsibility.

Id. at 200. Moreover in *Cox v. Louisiana, supra,* at 551, the Court struck down as unconstitutionally vague and broad a statute including as an element the congregating with others "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace, or under circumstances such that a breach of the peace may be occasioned." As construed by the Georgia courts, especially in the instant case, the Georgia provision as to breach of the peace is even broader than the Louisiana statute.

Thus, the Court must conclude that Georgia Code 26-6303 is unconstitutionally vague and broad, and the conviction therefor is set aside.

That portion of defendant's confinement attributable to a conviction under this statute must necessarily fall.

IT IS SO ORDERED.

This the 7th day of July, 1969.

/s/ SIDNEY O. SMITH, JR.

SIDNEY O. SMITH, JR.
United States District Judge

APPENDIX C

26-1409. (103 P. C.) *Opprobrious words as defense; question for jury.* — On the trial of an indictment for an assault, or an assault and battery, the defendant may give in evidence to the jury any opprobrious words, or abusive language, used by the prosecutor, or person assaulted or beaten; and such words and language may or may not amount to a justification, according to the nature and extent of the battery, all of which shall be determined by the jury. (Cobb, 841.)

26-6303. (387 P. C.) *Using abusive or obscene language.* — Any person who shall, without provocation, use to or of another, and in his presence, opprobrious words or abusive language, tending to cause a breach of the peace, or who shall, in like manner, use obscene and vulgar or profane language in the presence of a female, or any person who shall communicate to any virtuous female within this State by writing or printing any obscene or vulgar language or improper proposals, or by indecent or disorderly conduct in the presence of females on passenger cars, street cars, or other places of like character, shall be guilty of a misdemeanor. (Acts 1865-6, p. 233; 1872, p. 9; 1875, p. 25; 1890-1, p. 83; 1919, p. 103.)

APPENDIX D

(Filed Court of Appeals, New Orleans, September 3, 1970.)

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28274

JOHNNY C. WILSON,

Petitioner-Appellee,

v.

MILLARD GOODING, Warden,
Richmond County Public Works Camp,
Richmond County, Georgia,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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NOTICE OF APPEAL

I. Notice is hereby given that Millard Gooding, Warden, Richmond County Public Works Camp, the respondent-appellant above-named, hereby appeals to the Supreme Court of the United States from the judg-

ment affirming a judgment of the United States District Court declaring unconstitutional a statute of the State of Georgia entered in this action on August 19, 1970.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

II. The following question is presented by this appeal: Whether a state statute proscribing the unprovoked use to or of another person, and in the other person's presence, of opprobrious words or abusive language tending to cause a breach of the peace is unconstitutional for vagueness and overbreadth.

/s/ ARTHUR K. BOLTON

ARTHUR K. BOLTON
Attorney General

/s/ HAROLD N. HILL, JR.

HAROLD N. HILL, JR.
Executive Assistant Attorney General

/s/ MARION O. GORDON

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/s/ COURTNEY WILDER STANTON

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/s/ FRANKLIN PIERCE

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PROOF OF SERVICE

I, Marion O. Gordon, one of the attorneys for the Respondent-Appellant, the Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 1st day of September, 1970, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

On Johnny C. Wilson, the Petitioner-Appellee, by mailing three (3) copies in a duly-addressed envelope, with first-class postage prepaid, to his attorneys of record, as follows:

Mr. Howard Moore, Jr., and Mr. Peter Rindskopf, Moore, Alexander & Rindskopf, Suite 1154, Citizens Trust Company Bank Building, 75 Piedmont Avenue, N. E., Atlanta, Georgia 30303.

/s/ MARION O. GORDON

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Atlanta, Ga. 30334

CERTIFICATE OF SERVICE

I, Marion O. Gordon, one of the Attorneys for the Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of October, 1970, I served a copy of the foregoing Jurisdictional Statement on the Appellant by mailing copies of the same in duly addressed envelopes with postage prepaid to his counsel HOWARD MOORE, JR., and PETER E. RINDSKOPF, Suite 1154, Citizens Trust Company Bank Building, 75 Piedmont Avenue, N.E., Atlanta, Georgia 30303.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~867~~ 70-26

MILLARD GOODING, Warden
of the Richmond County,
Georgia Public Works Camp,
Appellant,

v.

JOHNNY C. WILSON, *Appellee.*

On Appeal from the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE APPELLANT

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IN THE

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MILLARD GOODING, Warden
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Appellant,

v.

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On Appeal from the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 431 F.2d 855. It is reproduced in the Appendix at pp. 14-19.

The opinion of the United States District Court for the Northern District of Georgia is reported at 303 F.Supp. 952. It is reproduced in the Appendix at pp. 6-12.

JURISDICTION

This suit was originally commenced in the United States District Court by a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241 et seq., seeking to set aside the appellee's State-court conviction. (Appendix 3). The appellant relied upon a State statute in support of his contention that the restraint imposed by him on the appellee's liberty was not in violation of the Constitution, treaties or laws of the United States. The District Court entered an order on July 8, 1969 in favor of the appellee and based entirely upon the District Court's determination that the State statute upon which the appellant relied was invalid and repugnant to the Constitution. (App. 6-13). The decision of the District Court was appealed to the United States Court of Appeals for the Fifth Circuit, which on August 19, 1970, entered a judgment affirming the judgment of the District Court. (App. 14-20). A notice of appeal to this Court was filed in the Court of Appeals September 3, 1970, and probable jurisdiction was noted on June 21, 1971. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. § 1254.

QUESTION PRESENTED

Whether a State statute proscribing the unprovoked use to or of another person, and in the other person's presence, of opprobrious words or abusive language tending to cause a breach of the peace is unconstitutional for vagueness and overbreadth.

STATUTES INVOLVED

Section 26-6303 of the Code of Georgia (1933) provided as of the dates involved in this case:

> *"26-6303.* (387 P. C.) *Using abusive or obscene language.* — Any person who shall, without provocation, use to or of another, and in his presence, or by telephone, opprobrious words or abusive language, tending to cause a breach of the peace, or who shall, in like manner, use obscene and vulgar or profane language in the presence, or by telephone to, of a female, or any person who shall communicate to any virtuous female within this State by writing or printing any obscene or vulgar language or improper proposals, or by indecent or disorderly conduct in the presence of females on passenger cars, street cars, or other places of like character, shall be guilty of a misdemeanor. (Acts 1865-6, p. 233; 1872, p. 9; 1875, p. 25; 1890-1, p. 83; 1919, p. 103, 1963, pp. 455, 456.)"

Section 26-1409 of the Code of Georgia (1933) provided as of the dates involved in this case:

> *"26-1409.* (103 P. C.) *Opprobrious words as defense; question for jury.* — On the trial of an indictment for an assault, or an assault and battery, the defendant may give in evidence to the jury any opprobrious words, or abusive language, used by the prosecutor, or person assaulted or beaten; and such words and language may or may not amount to a justification, according to the nature and extent of the battery, all of which shall be determined by the jury. (Cobb, 841.)"

STATEMENT

On February 2, 1967, the appellee, Johnny C. Wilson, was convicted of the unprovoked use to another, in

the other's presence, of opprobrious words or abusive language tending to cause a breach of the peace. Ga. Code § 26-6303 (1933), Ga. Code Ann. § 26-6303 (1953 Rev.). Wilson's application for federal habeas-corpus relief, after reciting the details of his conviction, set out among other things, the following claim for relief:

> "5. Ga. Code Ann. § 26-6303, under which petitioner was convicted on counts 3 and 4 of the indictment is on its face unconstitutionally vague and overbroad in violation of the first amendment and due process clause of the fourteenth amendment, it failing to apprize persons with sufficient particularity of the conduct which is sought to be prohibited and, by its excessive breadth, prohibiting activity protected by the first amendment. . . .
>
> "6. Ga. Code Ann. § 26-6303 is unconstitutionally vague and overbroad in violation of the first amendment and due process and equal protection clauses of the fourteenth amendment as applied to petitioner in the following respects:
>
> > (a) Neither the case law of the State of Georgia, the trial court, nor the Supreme Court of Georgia defined the words 'opprobrious words or abusive language,' thereby leaving the determination of petitioner's guilt to the discretion of the jury without adequate safeguards of petitioner's due process right of notice or first amendment right of freedom of speech." (App. 3).

The District Court construed the attack upon Ga. Code Ann. § 26-6303 a private, unofficial, copyrighted publication, as an attack upon the constitutionality of Ga. Code § 26-6303 (1933), and limited the scope of its inquiry to the facial constitutionality of this statute.

(App. 6). By order dated July 7 or 8, 1969, and entered July 8, 1969, the District Court declared the criminal statute in question to be unconstitutionally vague and overly broad. (App. 6-20).

A notice of appeal to the United States Court of Appeals was filed in the District Court on July 11, 1969, and a protective notice of appeal to this Court was filed in the District Court on July 17, 1969. This latter appeal was dismissed for want of jurisdiction on December 8, 1969. By judgment dated and entered August 19, 1970, the Court of Appeals affirmed the judgment of the District Court declaring the criminal statute in question to be unconstitutionally vague and overly broad. (App. 14-20).

SUMMARY OF ARGUMENT

A State statute proscribing the unprovoked use to or of another person, and in the other person's presence, of opprobrious words or abusive language tending to cause a breach of the peace does not intrench upon or restrict speech protected by the first amendment. The protection of the first amendment extends to the exchange of ideas; "fighting words" are not within the parameters of its protection. The States have a valid interest in proscribing the use of personally abusive epithets which, when addressed to an ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. The statute under attack does nothing more than carry into effect this valid concern and power.

The elements of the statute under attack are adequately defined. As defined, the statute provides fair notice to persons of ordinary intelligence of the conduct

thereby forbidden, and establishes for the criminal courts adequate and proper standards for adjudication of charges thereunder laid. A consideration of the cases construing the elements of the offense makes it clear that the opprobrious words and abusive language which are thereby prohibited are those which as a matter of common knowledge and under ordinary circumstances will, when used to or of another person, and in his presence, naturally tend to provoke violent resentment. The statute under attack simply states in statutory language what this Court has previously denominated "fighting words."

ARGUMENT

I

A STATE CRIMINAL STATUTE PROSCRIBING THE UNPROVOKED USE TO OR OF ANOTHER PERSON, AND IN THE OTHER PERSON'S PRESENCE, OF OPPROBRIOUS WORDS OR ABUSIVE LANGUAGE TENDING TO CAUSE A BREACH OF THE PEACE IS NOT UNCONSTITUTIONAL FOR VAGUENESS OR OVERBREADTH.

The appellee, Wilson, in his application chose to launch an attack upon the constitutionality of a state statute based on alleged vagueness *and* overbreadth. While recognizing that this is now a commonly accepted mode for mounting constitutional offensives, the appellant submits that the concept of overbreadth is more properly addressed to the first-amendment protections while the concept of vagueness is a due-process consideration. Practice does not make perfect, and constitutional concepts would seem to be entitled to the integrity of

their individual identities. This is especially true when the concepts are separately written upon the body of the Constitution by distinct amendments entered at different times. Absent such a separation, sound analytical application of constitutional principles and concepts is ofttimes impossible. Unfortunately, the opinion adopted by the court below made no attempt to distinguish between the two concepts. Consequently, the matter of the alleged vagueness of the statute will necessarily have to be treated together with the alleged first-amendment deficiency. At the same time, the appellant requests the Court to consider the fact that two separate, important principles are involved.

It is recognized that some statutes, notably those directed toward the control of political activity and advocacy, have been found to be unconstitutional where they have attempted to proscribe and make punishable the exchange of ideas and the advocacy without overt act of unlawful conduct. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). These statutes, and the cases involving them, have been uniformly concerned with conduct which is political and which is embraced within the first amendment. Other decisions have dealt with situations where statutes have proscribed conduct broadly, so as to sweep within the coverage of the statutory proscriptions conduct within the protection of the first amendment. *Cohen v. California*, ____ U.S. ____ (1971); *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

Unfortunately, some of these decisions are accom-

panied by opinions couched in the language of due process and touching upon the void-for-vagueness doctrine; however, it is submitted that the thread of constitutional infirmity which links these decisions, and others of similar import, is the fact that the statutes involved attempted to over-regulate protected first-amendment conduct. The question of overbreadth is truly a first-amendment question—one which can only be resolved by ascertaining the limitations of the proscription on conduct which the statute under attack sets forth and comparing this ascertained proscription with the protected areas of expression.

Ga. Code § 26-6303 (1933), the statute here under attack, does not infringe upon or restrict protected speech; that portion herein involved is a simple criminal prohibition directly related to that body of the law which defines and punishes the offense of assault and battery. Ga. Code § 26-1409 (1933), Ga. Code Ann. § 26-1409 (1953 Rev.). The obvious design of the statutory scheme is to avoid personal violence and not to regulate public speech.

A fair reading of the statute under attack indicates that it prohibits nothing more than the use of opprobrious and abusive words under circumstances which tend to cause shootings, stabbings, fisticuffs, and common affrays. It prohibits persons from engaging in conduct which constitutes a justification for a simple assault and battery. As such, it is not a political statute. Its provisions are not so broad as to prohibit or infringe upon even the most flaming political argument or debate, the object of which is to quicken the sense of the hearer and to move him to engage in a protracted expression of his own political philosophy.

The first amendment was not intended, and is not applied, to protect all speech, i.e., all verbal exercises. *Cohen v. California, supra* at p. 4. Freedom of speech is not an absolute right. *Cox v. Louisiana,* 379 U.S. 559 (1965). In declaring that obscenity is not protected by the first amendment, this Court held that:

> "The unconditional phrasing of the first amendment was not intended to protect every utterance. . . . The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 483-84 (1957).

Even the *Roth* dissenters expressed the thought that "freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it." *Id.* at 514. Cf. *Times Film Corp. v. Chicago,* 365 U.S. 43 (1961).

This Court has proclaimed on numerous occasions that the constitutional guarantee of freedom of speech is concerned with the exchange of political and social ideas, and the Court has expressly held that "the central commitment of the first amendment . . . is that 'debate on public issues should be uninhibited, robust, and wide open.' " *Bond v. Floyd,* 385 U.S. 116 (1966). See also *Wood v. Georgia,* 370 U.S. 375 (1962). In fact, there appears to be universal agreement that a major, if not the major, purpose of the first amendment is "to protect the free discussion of governmental affairs." *Mills v. Alabama,* 384 U.S. 214 (1966).

At this point, it seems proper to stop and examine again the Georgia statute under attack and to note, by a process of exclusion, what it does not purport to make

punishable. It does not seek to punish the advocacy of an idea. *Brandenburg v. Ohio, supra.* The statute as drafted leaves one free to use abusive and opprobrious language to advocate the violent overthrow of our system of government, if that be the person's desire. It does not apply to abusive or opprobrious language utilized in the mere abstract teaching of the moral propriety or necessity for a resort to force and violence to effect political and/or social changes. Cf. *Elmore v. State,* 15 Ga. App. 461 (1904). It does not attempt to affect the mass dissemination of ideas by media or printed matter.

A person is free, if that be his desire, to use opprobrious and abusive language in describing another person not in the presence of the person so described. The speaker may even use opprobrious and abusive language to or about another person in his presence provided, of course, that the use of the language under the circumstances does not tend to a breach of the peace. As viewed, the statute is not designed to regulate social or political commentary and activity.

The first amendment protects the freedom of assembly; however, it does not protect assemblage which is incidental to, and a part of, a punishable conspiracy. In the present case, we are concerned with a statute which on its face does not attempt to regulate advocacy, instigation or incitation. Rather it deals solely with face-to-face provocation. The appellant submits that the first amendment's protection of free speech was never intended to clothe a person in immunity who by use of words to and in the face of another person intentionally provokes that other person to acts of violence *against*

the speaker. Cf. *Cohen v. California, supra* at p. 6; *Feiner v. New York*, 340 U.S. 315 (1951); *Terminello v. Chicago*, 337 U.S. 1 (1949). Such an extension of the first amendment would not be in line with ordered concepts of civilized democracy; rather, it would necessarily tend toward a disorderly, bawdy and violent social structure.

The States have a legitimate interest in prohibiting the use of abusive and opprobrious words which tend to provoke violent, immediate, physical affrays. The common need of all citizens, including those who desire to engage in peaceful expressions of their political views, to live in a society in which free and robust debate is a meaningful concept is a compelling reason for the States to restrict the use of abrasive language which tends to provoke others to the commission of immediate, physical violence. Stirring the listener to action by a heated debate, a coolly logical speech, or even a wildly emotional harangue is an acceptable practice and a constitutionally protected right. But, deliberate provocation of killing or violence—acts to which the Georgia statute is addressed—has not enjoyed historical acceptance in this country. Even debate or speech-making, designed to move the listener to constructive, albeit loud, political action cannot survive in a community which is impotent to prevent a man from deliberately triggering physical outbursts.

An examination of the Supreme Court's opinion in *Brandenburg v. Ohio, supra,* will furnish a very adequate vehicle for illustrating the operation of the statute under attack. In footnote 1 of the Court's per curiam opinion there were set forth various phrases derogatory of negroes and Jews. According to the opinion, these

phrases were clearly understandable from the sound track of a sound motion-picture film taken at a Ku Klux Klan rally in Ohio. This film had been introduced into evidence against the defendants who had staged the rally in a prosecution under the Ohio Criminal Syndicalism statute, Ohio Rev. Code ¶ 2923.13. By derivation, it is not difficult to imagine and picture the situation were any one of these phrases to be used in a direct face-to-face confrontation with an ordinary member of the class thereby degraded. Cf. *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940).

The situation is not one then of mere advocacy of an idea nor the communication of thoughts. In such a circumstance the words, many of which are obviously opprobrious, and the language, much of which is clearly abusive, constitute a provocation to physical conflict. Under the laws of Georgia, as previously pointed out, they could well be found to constitute a justification for an assault by the demeaned person upon the speaker. The State of Georgia submits that the first amendment was never intended and has never been applied to negative the police power of the States to make punishable such deliberate provocations. There is simply nothing in any majority opinion of the Supreme Court in the area of first-amendment rights which indicates that the States are helpless and powerless to proscribe what in effect amounts to a verbal assault.

The shaking of a fist by a speaker in the advocacy of an idea may under certain constructions of the first amendment be protected, symbolic free speech, but none of these theories would go so far as to say that the belligerent shaking of the fist under the nose of another

person is not conduct which the States may punish. Yet, it is but a small step from the decision of the court below to a decision striking down simple assault statutes on the ground that they contravene the first amendment.

Additional support for the statute's constitutional validity can be found in the continuing vitality of the clear-and-present-danger limitation on first-amendment freedoms. *Brandenburg v. Ohio, supra.* It is possible that this limitation has by virtue of a footnote in the *Brandenburg* majority opinion been relabeled the "tendency to produce forcible action" limitation. *Brandenburg v. Ohio, supra* at 447, n. 2. In either case, the Georgia statute is within the limitation.

It is to be noted that the statute under attack does not proscribe the use of language tending to a breach of the peace; rather, it proscribes the use of such language *to and of another person and in his presence* tending to a breach of the peace. We only need to reimagine the illustrations conveyed by the *Brandenburg* decision to realize the extreme importance of this difference in testing the statute under the first amendment. Certainly, it cannot be said that the Georgia statute does anything more than proscribe language fully and completely related to its tendency to produce forcible action. Again, it is impossible to construe the Georgia statute as being applicable to the mere advocacy of an idea.

For these reasons, and in light of the foregoing discussion, the State of Georgia submits that its statute which the court below declared unconstitutional does not by its language breach protected first-amendment liberties. Provoking a fight, whether it be by "getting in the first lick" or by using abrasive language is criminal

conduct. Criminal conduct per se does not enjoy first amendment protection.

The State of Georgia submits that provoking a fight is a common crime and that such provocations are not shrouded under the mantel of the first amendment. Provoking a blow with the fist or the retort of a pistol has never been, and should not now be, equated with provoking those mental processes which lead to a useful social and political change. The appellant submits that a careful reading of Ga. Code § 26-6303 reveals that the statute does not infringe upon constitutionally protected speech. It is simply a ban upon the use of personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Cohen v. California, supra* at pp. 5-6.

II

A STATE STATUTE PROSCRIBING THE UNPROVOKED USE TO OR OF ANOTHER PERSON, AND IN THE OTHER PERSON'S PRESENCE, OF OPPROBRIOUS WORDS OR ABUSIVE LANGUAGE, AND INTERPRETED BY THE COURTS OF THE STATE AS PROHIBITING OPPROBRIOUS WORDS OR ABUSIVE LANGUAGE "LIKELY TO CAUSE A BREACH OF PEACE" OR "WHICH WOULD NATURALLY TEND TO CAUSE A BREACH OF PEACE UNDER ORDINARY CIRCUMSTANCES", IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS INTERPRETED BY THE COURTS OF THE STATE IN QUESTION.

While the constitutional cornerstones of alleged vagueness and overbreadth have been placed in close juxtaposition, the concepts represented by the two words are not necessarily allied, for a statute could employ words of precise and definite meaning to intrude upon an area substantively protected by the Constitution. On the other hand, a statute could employ vague and imprecise words raising procedural due-process questions, and still not be overly broad because of its lack of infringement upon a substantive constitutional provision.

A differentiation between the concepts of vagueness and overbreadth should be drawn in this case for two principal reasons. Firstly, the Georgia statute is neither vague nor overly broad. Secondly, the two concepts are not mutually inclusive, and the doctrines represented should not be mingled and allowed a degree of interplay which would permit each of the diverse concepts to come in aid of the other.

Implicit in the appellee's claim of vagueness is the contention that he, as an individual of at least ordinary intelligence, cannot understand the statute, for "the concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *Landry v. Dailey*, 280 F.Supp. 938, 951 (E.D. Ill. 1968), appeal dismissed *Landry v. Boyle*, 393 U.S. 220 (1968).

The overbreadth claim necessarily rests upon a contention that the statute infringes upon a substantive right specifically guaranteed by the Constitution. In drawing the distinctions between the legal concepts of vagueness and overbreadth, the three-judge court in *Landry, supra*, pointed out that "the concept of overbreadth . . . rests

on principles of substantive due process which forbid the prohibition of certain individual freedoms." *Landry v. Dailey, supra* at 951. Having previously shown that the statute is not overly broad so as to prohibit substantively protected first-amendment exercises, the appellant now turns to the due-process claims, including the appellee's first-amendment "vagueness" claims.

The Georgia statute is plain on its face. As such, the statute does not really require judicial construction, as its meaning is clear without interpretation. In examining a statute, a court should accord it a normal and ordinary construction as indicated by the words employed by the legislative draftsmen. The standard to be used is whether the statute gives "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss,* 340 U.S. 612, 617 (1953). The words employed in a statute generally have the meaning ordinarily ascribed them by "men of common intelligence." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 573 (1942). For an additional detailed discussion of this general area, see Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law,* 3 Vand.L.Rev. 531, 539-43 (1950).

In disposing of the alleged due process deficiencies in the statutes involved in the now famous *Roth* and *Alberts* obscenity cases, this Court held that

> "'. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by *common understanding and practices. . . .*'" *Roth v.*

United States, 354 U.S. 476, 491 (1957). (Emphasis added.)

Just as the citizens of the United States were held to recognize the conduct forbidden by the obscenity statutes involved in the *Roth* and *Alberts* cases, men of common understanding know, without being told by the General Assembly of Georgia, that the expression of some thoughts under particular circumstances is highly likely to produce a black eye or a broken nose. This obvious truth has received judicial recognition and application. *Chaplinsky v. New Hampshire, supra* at 573. The Georgia statute does not forbid "conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Baggett v. Bullitt, supra.* See also *Cramp v. Board of Public Instruction of Orange County, Florida*, 368 U.S. 278 (1961).

The appellant submits that the statute more than adequately meets due-process requirements and that it is not overly broad. While this may be discerned from a reading of the statute, it is unnecessary to indulge in speculation concerning its application, as numerous cases have reached the appellate courts of Georgia requiring the application of Ga. Code § 26-6303. The standard, prevailing rule of statutory construction was early applied to the language of this section. *Stevenson v. State*, 90 Ga. 456, 458 (1892). Consequently, the phrase "opprobrious words or abusive language" is to be taken in the ordinary sense conveyed by the words.

In determining the ordinary sense of words, reference to a standard, accepted dictionary has been judicially approved. *United States v. Strong*, 263 F. 789, 796

(W.D. Wash.). Thus, "abusive" is synonymous with coarse, insulting words. Webster defines "abusive" as "given to or tending to abuse". "Abuse" is by Webster defined as "vituperative words; coarse, insulting speech; abusive language; virulent condemnation; reviling." The same authoritative source defines "opprobrious" as being expressive of opprobrium (reproach, disgrace, contempt, infamy, reprobation), as attaching disgrace, as being reproachful and/or scurrilous. Opprobrious language is disgraceful, abusive, insulting, offensive, scurrilous, gross and vulgar. Thus, opprobrious has been judicially defined as meaning reproachful, scurrilous, infamous. *Behling v. State*, 110 Ga. 754, 755 (1900); *Dillard v. State*, 41 Ga. 278, 281, 282 (1871). The term "abusive and opprobrious language" contemplates words conveying contempt and insult. *Behling v. State, supra.* Similar definitive concepts have been applied in other states. See *Peters v. State*, 51 So. 952, 953 (Ala. 1910); *State v. Pope*, 96 A. 313, 314 (Conn. 1916); *People v. Sinclair*, 149 N.Y.Supp. 54 (Gen. Sess. 1914).

It is important to note that the Georgia statute under attack does not prohibit the use of abusive language and opprobrious words. Considerably more is required in order for conduct to become punishable under the statute. "Proof of the use of opprobrious words alone is not sufficient, without showing the circumstances or in any way proving want of provocation." *Fuller v. State*, 72 Ga. 213 (1883), approved *Hardin v. State*, 114 Ga. 58 (1901). See also *Fish v. State*, 124 Ga. 416 (1905).

> "We cannot think that the legislature was aiming solely at the words, without reference to the thoughts or idea the words are intended to convey. There is not a single word in the language, how-

ever coarse, low or vulgar, that may not be and is not often used to convey proper and decent ideas, and it is a mawkish and really an indelicate and immodest sensitiveness that blushes at a word which may be used obscenely, but which the occasion and the context shows not to be so used. Words get their point and meaning almost entirely from the time, place, circumstances and intent with which they are used, and it seems to us a very unfair interpretation of this clause of the Code to say, that it is directed simply against the use of certain words which are by common consent banished from decent society. If there are any such words in our language they are very few, and as we have said, they are only obscene and vulgar accordingly as they convey obscene and vulgar ideas.

"This statute does not stand upon the footing of statutes against public indecency. Its object is not to keep pure the public morals. It is to be found in that chapter of the Code which punishes private wrongs, and *forms a part of the same clause which makes it a penal offense to use opprobrious and abusive language to another.*" *Dillard v. State, supra* at 281. (Emphasis added.)

In every prosecution involving the statute under attack, a mixed question of fact and law is whether the alleged words were likely to cause a breach of the peace. *Jackson v. State,* 14 Ga. 19 (1913). Further, the statutory language relating to the tendency to breach of peace has been adequately construed by the Georgia courts so as to define the situations within which the use of abusive and opprobrious language, as commonly understood, is prohibited. *Elmore v. State,* 15 Ga. App. 461 (1914); *Jackson v. State, supra.*

"Though the words failed to bring about a breach

> of the peace, the offense is complete if this would nevertheless be the ordinary and natural tendency. The words of the statute, 'tending to cause a breach of the peace,' are words of description indicating the kind or character of opprobrious or abusive language that is penalized, and the use of language of this character is a violation of the statute, even though it be addressed to one who, on account of circumstances or by virtue of the obligations of office, cannot actually then and there resent the same by a breach of the peace. . . ." *Elmore v. State, supra* at 461-2.

Thus, this portion of the statute has been judicially construed as "likely to cause a breach of peace," or, in other words, language "which would naturally tend to cause a breach of the peace under ordinary circumstances." *Elmore v. State, supra; Jackson v. State, supra.* The *Elmore* decision makes it abundantly clear that the terminology breach of peace is judicially considered to be a resentment by physical assault and battery. *Elmore v. State, supra* at 462-3. Hence legislative intention is to provide the affronted person "some other remedy than that which nature dictates, to-wit, club law." *Dillard v. State, supra* at 280.

The thrust of these decisions illustrates the fact that, as construed by the Georgia courts, the statute in question is not applied to regulate speech. It is not a statute enforcing any concept within the general view of public morals. Instead, it falls within the area of those statutes designed to further the State's domestic peacekeeping function. Under the statute as construed, a person is free to utilize abusive language and opprobrious words so long as he does not utilize those words in a contextual situation where, under ordinary circum-

stances, the natural effect of the language would be to cause a breach of the peace. Just as one is not free to cry "fire" falsely in a crowded theater, one is not free, however naturally coarse, abusive and opprobrious he might be, to use abusive language and opprobrious words to and of another, and in the other's presence, in a situation where, under normal and natural circumstances, a breach of the peace is thereby likely to be caused.

The appellant submits that the interpretations placed upon the statute by Georgia appellate courts adequately demonstrate the narrow range within which the statute operates. It is well to emphasize that as construed no less than four distinct elements must be present in order to sustain a conviction under the section in question. Firstly, there must be abusive language or opprobrious words, as the same is commonly understood. Secondly, these words or this language must be used to or of another person. Thirdly, the remarks must be made in the immediate, direct presence of the person either to whom it is addressed or of whom it has reference. Fourthly, the entire situation in which the words are spoken must, under normal circumstances, color the conduct of speaking so as to make this conduct likely to cause a breach of the peace. Taken together these four elements outline a proscription of provocative, assaultive conduct which it is clearly within the police power of the States to prohibit.

The latest decisions of this Court continue to reaffirm the proposition that first-amendment rights are related to political activities and not to mere criminal conduct. "Speech and press are, of course, to be free, so that *public matters can be discussed* with impunity." *Gregory v.*

Chicago, 394 U.S. 111, 125 (1969), separate opinion. The Court recognizes that men's homes can be protected "from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown." *Gregory v. Chicago, supra* at 125 (Black and Douglas, JJ., concurring). If the minds of men may be protected from the communication of "fears of the unknown", the appellant submits that there can be no question that overt and assertive offers of violence (constituting known fears) may be prohibited.

In dealing with Ohio's criminal syndicalism statute, this Court noted that the statute failed to distinguish between mere teaching of violence and "preparing a group for violent action and steeling it to such action." *Brandenburg v. Ohio, supra* at 448. In striking down the statute, the Court said that there was no narrowing State construction of the definition of the crime "in terms of mere advocacy not distinguished from incitement to imminent lawless action." *Id.* at 447. The *Brandenburg* Court said, in effect, that a statute may not forbid mere advocacy. That proposition is unquestioned. The Court did not leave the matter there. It said, at least inferentially, that a statute prohibiting speech which incites "to imminent lawless action" is permissible. The Georgia statute prohibits abusive and opprobrious speech "tending to cause a breach of the peace". There is neither logical nor legal difference between the concepts represented by the words "tending to cause a breach of the peace" and "incitement to imminent lawless action".

In *Cohen v. California, supra* at pp. 5-6, this Court reaffirmed its traditional view that the States are free

to proscribe without a demonstration of additional justifying circumstances the use of "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. The "fighting words" terminology of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), was again noted. The fact that the California statute reached beyond instances of personally provocative words or phrases "directed to the person of the hearer" was meaningfully noted. *Cohen v. California, supra* at p. 6.

Had the State of Georgia chosen to define the proscribed conduct as "fighting words", the contention undoubtedly would be advanced that this definition was inadequate to succinctly describe and functionally narrow the elements of the offense. It is submitted that what the General Assembly has done in the statute under attack is to define with greater particularity those words and coupled circumstances which this Court on several occasions has characterized as "fighting word". The language of this workman-like codification reaches no further than those situations discussed by this Court in *Chaplinsky v. New Hampshire, supra* and simply and adequately prohibits what the speaker should recognize as a deliberate provocation to violent resentment. It is a simple criminal statute which, while it deals with verbal conduct, has no other reasonable nexis with the first amendment.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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I, Dorothy T. Beasley, one of the attorneys for the Respondent-Appellant, the Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ..... day of ....., 1971, I served copies of the foregoing Brief for the Appellant on the several parties thereto, as follows:

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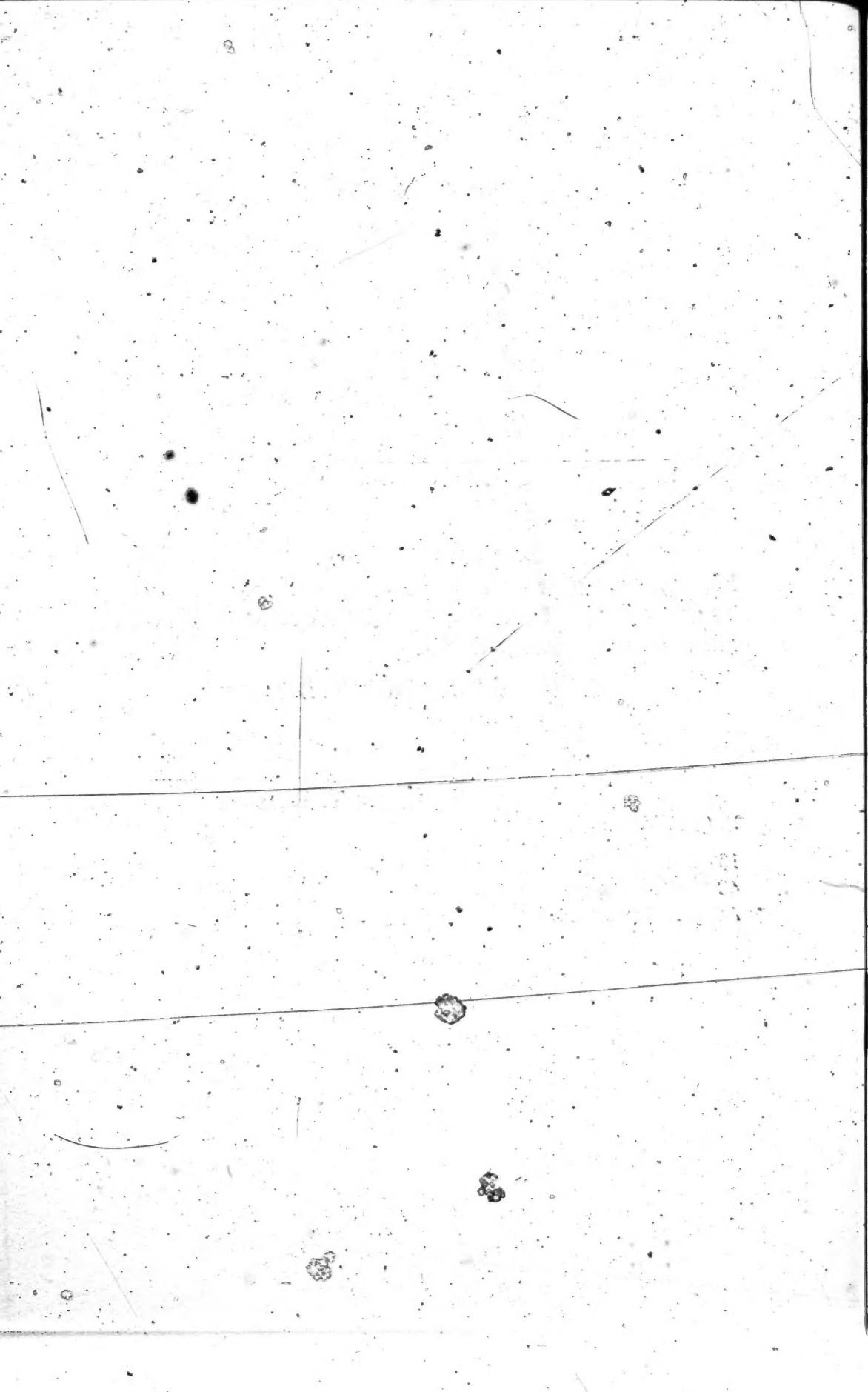

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IN THE

Supreme Court of the United States

No. 70-26

MILLARD GOODING, Warden,

Appellant,

v.

JOHNNY C. WILSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE APPELLEE

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IN THE

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No. 70-26

MILLARD GOODING, Warden,

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v.

JOHNNY C. WILSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE APPELLEE

QUESTION PRESENTED

Whether former Section 26-6303, Ga. Code, proscribing the unprovoked use to or of another person and in the other person's presence, of opprobrious words or abusive language tending to cause a breach of the peace, is unconstitutional for vagueness and overbreadth.

STATEMENT

In addition to the appellant's statement, the following are also relevant to the Court's consideration of the issues here presented.

Appellee, JOHNNY C. WILSON, was convicted on February 2, 1967, of all counts of a four-count indictment charging him with two counts of assault and battery (counts 1 and 2) and two counts of opprobrious words or abusive language (counts 3 and 4). Appellee was found by a jury to have said, in regard to count 3, "white son of a bitch, I'll kill you" and "you son of a bitch, I'll choke you to death," and in regard to count 4, "you son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." The persons upon whom appellee committed the assault and battery offenses were the same persons against whom the illegal language was found to have been used. Petitioner was sentenced to serve twelve months (the maximum for a misdemeanor under Georgia law) on each of the counts, with counts 1, 2 and 3 to be served consecutively and count 4 to be served concurrently with count one. Record, *Wilson v. State*, No. 24113, Georgia Supreme Court, at 16 ff.

Appellee's conviction was affirmed upon appeal to the Georgia Supreme Court, *Wilson v. State*, 223 Ga. 531 (1967), and certiorari was denied by this Court, Mr. Justice Douglas dissenting. *Wilson v. Georgia*, 390 U.S. 911 (1968). Prior to the denial of certiorari, inquiry was made from the office of the Supreme Court Clerk as to whether appellee was serving any of his sentences under § 26-6303 concurrently with any of the assault and battery sentences; the answer was, of course, in the affirmative.[1]

Appellee began service of his state sentence on April 15, 1968. On March 5, 1969, he filed a petition for writ of

[1]Telephone conversation between the office of the Supreme Court Clerk and Howard Moore, Jr., counsel for petitioner Wilson, January, 1968.

habeas corpus in the United States District Court for the Northern District of Georgia, the district in which his state conviction was obtained. The petition was granted and petitioner was released upon $1,000 bail on August 11, 1969, into the custody of the United States Marshal. Had appellee not been released by order of the district court, he would have completed service of his state sentences (with appropriate reductions of time for good behavior that he had accrued) some two months later, on October 15, 1969.[2]

Upon his release from state custody, appellee entered upon the service of his federal sentence arising out of the same incident. *Tillman v. United States*, 406 F.2d 930 (5th Cir. 1969), *cert. den.* 395 U.S. 830. On approximately August 10, 1971, appellee was released from custody and is presently on federal probation in West Point, Mississippi.

Subsequent to appellee's release on bail from state custody, the United States Court of Appeals for the Fifth Circuit affirmed the granting of the writ in his favor. *Wilson v. Gooding*, 431 F.2d 855 (5th Cir. 1970). In a civil suit attacking the same statute under which appellee was convicted, a three-judge federal court declared § 26-6303 unconstitutional and enjoined further prosecution thereunder. *Black Planning Committee v. Minchew*, ___ F.Supp. ___, No. 669 (S.D. Ga. September 23, 1970). No appeal was taken from that decision.

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[2]Data as to dates of appellee's incarceration and release time obtained from Georgia State Board of Corrections. Telephone conversation by the undersigned with Records Department, August 23, 1971.

ARGUMENT

I.

"OPPROBRIOUS WORDS OR ABUSIVE LANGUAGE" IS SO VAGUE AND OVERBROAD AS TO VIOLATE THE FREEDOM OF SPEECH GUARANTEE OF THE FIRST AND FOURTEENTH AMENDMENTS.

Georgia Code § 26-6303, under which appellee was convicted and which he successfully challenged in the district court provides in relevant part:

> "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor."

The operative elements of the statute may quickly be seen as two: "opprobrious words or abusive language," and "tending to cause a breach of the peace." The other terms, "without provocation" and "in his presence" add nothing to the substance of the crime, although they may provide a defendant with means of, in certain limited factual situations, asserting a defense against the application of the statute. But, for a defendant who has not been provoked and who utters his words in the presence of the affected other, a crime cannot have been committed without the utterance of "opprobrious words or abusive language." And, even should the words or language be uttered, no crime can have been committed unless they are words or language "tending to cause a breach of the peace." The two phrases will be discussed separately in the order in which they appear in the statute.

As noted by the district court in granting the writ, ". . . no meaningful attempt has been made [by the courts of the State of Georgia] to limit or properly define these terms [opprobrious words or abusive language]. (App. 10) It must be noted that there is not even a common-law gloss upon the terms—the chapters of Chase's *Blackstone* (3rd ed. 1890) on "Offenses Against Justice" (Ch. VIII) and "Of-

fenses Against the Public Peace" (Ch. IX) do not mention "opprobrious words." Accordingly, both the lower court and the appellant have turned to Webster's dictionary in an attempt to infuse content into the legal definitions. See, App. 10; Brief for the Appellant, 18.

We are accordingly left with definitions of "opprobrious" that include "attaching disgrace, reproachful; scurrilous" (App. 10), "infamous" (Appellant's Brief, 18), and synonyms that include "disgraceful, abusive, insulting, offensive," (App. 10) as well as "words convenying contempt" (Appellant's Brief, 18).

The definitions "abusive" and "opprobrious" represent conclusions of the legislature rather than specific guides to the jury. There is no way of determining whether "abusive" refers to the very nature of a word, or to a misguided application by a speaker. A word used for the highest and most serious of purposes—as during a religious sermon—might equally be construed as "opprobious" when used in the street. Indeed, the preacher himself enjoys the most limited protection. See *Holcombe v. State*, 5 Ga. App. 47, (Ga. App. 1908) (the "big fat rump" case). Under Section 6303, a term completely innocuous in itself might be judged "abusive" when used by a talented speaker of scornful disposition—or when heard by a listener of extraordinary sensitivity.

The vagueness and overbreadth of "opprobrious" and "abusive" has been compounded by the usual treatment of the words by the Georgia appellate courts. With the notable exception of the instant case, the courts have held that it was error for a judge to charge certain words to be opprobrious and abusive as a matter of law; rather, it was up to the jury to make that decision. And, in the few decisions to actually reach the merits of spoken words or phrases, the courts are in conflict and confusion. Thus, by way of example, the court held, in *Shields v. State*, 89 Ga. 549 (Ga. S.Ct. 1892), that "God damn lowdown son of a bitch," was opprobrious and abusive, but not obscene or vulgar, while

but a few years later, it held that it was error for the judge to charge the jury that any particular words are opprobrious or abusive, or to tell the jury that, "God damn you, why don't you get out of the road?" was in violation of the statute. *Fish v. State*, 124 Ga. 416 (Ga. S.Ct. 1905); *Jackson v. State*, 14 Ga. App. 19 (Ga. Ct. App. 1913).

The confusion about whether any particular words are either opprobrious or abusive has been exacerbated by the Georgia Supreme Court decision in appellee's case. *Wilson v. State*, 223 Ga. 531 (Ga. S.Ct. 1967). In that decision, the court said, "The words charged were within themselves opprobrious and abusive [citing *Shields v. State, supra*] and it was not necessary to allege in what manner they were opprobrious and abusive." 156 S.E. 2d 446, 449. The opinion is distinguished by its failure to reconcile or attempt to reconcile the *Shields* doctrine that certain words are opprobrious with the *later* decisions that it is completely a matter for the wisdom of a jury.[3]

The vice of vagueness, when compounded by the absence of standards to prohibit arbitrary and unreasonable enforcement, renders a statute such as Section 6303 susceptible of application when and where the police see fit. Not unnaturally, actions which smack of dissent or unconventionality

[3]The decision, even assuming that in Georgia certain words can be opprobrious *per se*, leaves one in continuing doubt as to the interaction of *Shields* and *Wilson*. Is the speaker henceforth to conclude that "God damn lowdown," used in *Shields* but not in *Wilson* to modify "son of a bitch," was not the cause of the phrase being considered opprobrious and abusive? If plain "God damn you" presents a question for the jury, *Jackson v. State, supra*, can it be that the more ornamented "God damn lowdown" is still opprobrious and abusive *per se*? And what of appellee's use of the word "white" to modify one of his references to the parentage of the officers with whom he was embroiled; does the term "white," in the courts of Georgia, convey any special opprobrium? Would the term "Black;" or, would it matter if the speaker were mistaken as to the racial identity of the person addressed?

are the first to bear its sting.[4] See *NAACP v. Button*, 371 U.S. 415, 432-33, 435 (Court must consider "possible applications of the statute in other factual contexts." *Id.* at 432)

The opinions of the Georgia courts in interpreting Section 6303 "license[s] the jury to create its own standards in each case." *Herndon v. Lowry*, 301 U.S. 242, 263 (1937). The statements of the trial judge in the instant criminal trial made it explicit at the trial that all standards were in the hands of the jury. Record, *Wilson v. State*, No. 24113, Georgia Supreme Court, 207-212. Previous decisions under Section 6303 bear this out by expressly authorizing the jury to create its own standards in each individual case. *Holcombe v. State, supra; Shields v. State, supra.*

Definition of crime is the function of the Legislature. But, the exercise of unfettered and unguided discretion by a jury is constitutionally impermissable. *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966).

That lack of provocation must be proven is not the requirement of willful or knowing unlawful conduct which has been relied upon in sustaining legislation challenged upon vagueness grounds. *Screws v. United States*, 325 U.S. 91 (1945). Proving lack of provocation only goes to the question of willful action or scienter. See *Smith v. California*, 361 U.S. 147 (1959). The statute, by its terms, does not make the crime one of intent, and the vagueness of the terms eliminates any possibility of scienter.

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[4]There is no constitutional dispute about petitioner's assault and battery charges stemming from the same physical incident with the same officers who brought the Section 6303 counts as well. Could the vagueness of Section 6303 have furnished an opportunity to "pile on" charges against a Black SNCC member involved in an anti-war protest? Cf. *Bond v. Floyd*, 385 U.S. 116. When appellee was arrested and charged in August, 1966, Representative Bond was still excluded from the Georgia House, awaiting this Court's December 5, 1966 decision.

The decision of the Georgia Supreme Court in appellee's case renders Section 6303 particularly subject to constitutional attack, for by the court's reading of the statute, words may now be declared illegal *per se*. But, this is exactly the sort of state-imposed cleansing of "public debate" by forbidding particular words that the Court has condemned this past term. *Cohen v. California*, ___ U.S. ___ 91 S.Ct. 1780, 1785. And, just as California had outlawed, by use of the term, "offensive conduct," a vast unknown sweep of words, so too has Georgia limited freedom of expression by its employment of "opprobrious" and "abusive." The record is barren, as it must be, of any evidence that officials in Georgia are more qualified than those in sister states to distinguish one offensive word from another, to recognize that one man's vulgarity is another's lyric, or to make principled distinctions in this area so as to take away from the individual his personal rights in matters of style and taste. Cf. *Cohen, supra*, 91 S.Ct. at 1788.

There seems little doubt that Paul Cohen's vulgar jacket, passing for the moment its auditory lack, would have otherwise qualified as "opprobrious" or "abusive" under the Georgia decisions. And, as such, the statute must fall.

Nor does it require any extension of this Court's holdings to find that making criminal "abusive language" does violence to the First Amendment. After all,

> "... a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. City of Chicago*, 337 U.S. 1, 4.

There is simply no way for the speaker to know when his speech has gone beyond the protected pale and become "abusive" in the sense that it will subject him to possible

criminal penalties. The result is bound to be a lessening of "uninhibited, robust and wide open" debate on public issues. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270; *Bond v. Floyd, supra.*

It is firmly settled under the First Amendment that the public expression of ideas may not be prohibited because the ideas are themselves offensive to some of their hearers. *Street v. New York*, 394 U.S. 576, 592. But, how is a Georgia speaker to know when his speech turns from being constitutionally-permissible, although offensive, and becomes, rather, illegal and criminally "abusive." Cf. *Cantwell v. Connecticut*, 310 U.S. 296; *Cox v. Louisiana (I)*, 379 U.S. 536, 462-3.

A long and worthwhile tradition of free speech will be limited and abandoned if a state may impose criminal sanctions upon "abusive" language. Those who are outspoken on issues of the day may always be easily considered abusive by those holding other views, especially if those others have the power of arrest and conviction. Stout-hearted discussion may be intended to influence views, but the First Amendment makes no demand that it be couched in terms to win friends as well. "Maintenance of the opportunity for *free* political discussion is a basic tenet of our constitutional democracy." *Cox v. Louisiana (I), supra*, 379 U.S. at 552 (Emphasis supplied).

It seems certain that the constitutionally protected speeches in *Cox, supra, Brandenberg v. Ohio*, 395 U.S. 444, and *Street, supra*, as well as the caustic criticism in *Ashton v. Kentucky*, 384 U.S. 195, and *Garrison v. Louisiana*, 379 U.S. 64, might be considered by some as "abusive" within the meaning of the Georgia law at issue here. It is hence clearly a statute which fails to draw the necessary and proper distinctions so as to prevent impermissible intrusion upon the freedoms guaranteed by the First Amendment. And, as such, it cannot stand.

The constitutional standard which the courts below have upheld in the instant case is no different from the Court's

recent decision in *Coates v. City of Cincinnati*, ___ U.S. ___, 91 S.Ct. 1686. For the "annoyance" standard of *Coates* one might easily substitute the "opprobrious words or abusive language" of the State of Georgia; the statute here "is unconstitutionally vague because it subjects the exercise of the right of [speech] to an unascertainable standard and unconstitutionally broad because it authorizes the punishment of protected conduct." *Coates, supra*, 91 S.Ct. at 1688. The statute is vague because the standard of conduct which it specifies is uncertain; "men of common intelligence must necessarily guess at its meaning."[5] *Connally v. General Construction Co.*, 269 U.S. 385, 391; *Coates, supra*. For Georgia to have enacted a statute which prohibited "fighting words," and no more would have been acceptable. Cf. *Chaplinsky v. New Hampshire*, 315 U.S. 568. But, the prohibition against "opprobrious words and abusive language" defines less and prohibits more. This the state cannot do without trenching upon the First Amendment.

II.

"TENDING TO CAUSE A BREACH OF THE PEACE" IS SO VAGUE AND OVERBROAD AS TO VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS

Section 6303, the Georgia statute at issue here, does require more than the mere use of "opprobrious words or abusive language" for a violation. The words or language, in addition, must be, "tending to cause a breach of the peace." (App. 3). But, to catalogue what the vaguely proscribed words must do in terms that are no less certain does nothing to cure the statute of its constitutional vices. That

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[5] In Georgia as in Cincinnati there is no certainty "upon whose sensitivity a violation does depend," *Coates, supra*, 91 S.Ct. at 1688, for the courts have either barred certain words or left the whole affair in the hands of a jury. Cf. *Fish v. State, supra; Jackson v. State, supra.*

the vice remains uncured may be further seen from the fact that Georgia courts have, in connection with Section 6303, defined "tending to cause a breach of the peace" in circular terms. Thus, "The words of the statute, 'tending to cause a breach of the peace', are words of description indicating the kind or character of opprobrious or abusive language that is penalized, and the use of language of this character is a violation of the statute. . ." *Elmore v. State*, 15 Ga. App. 461, 462 (Ga. Ct. App. 1914). To paraphrase *Elmore*, opprobrious words tend to cause a breach of the peace if they are opprobrious; and, in further paraphrase, words which would tend to cause a breach of the peace are illegal because they would so tend. Lewis Carroll and *Alice in Wonderland* have nothing on this statutory gloss.

Convictions for "breach of the peace" where the offense was imprecisely defined were similarly reversed in *Edwards v. South Carolina*, 372 U.S. 229, 236-8, and *Cox v. Louisiana (I)*, 379 U.S. 536, 551-552. These decisions recognize that to make an offense of conduct which is "calculated to create disturbances of the peace" leaves open the standard of responsibility. It involves calculations of the boiling point of particular persons or groups, including perhaps a jury, rather than an appraisal of the nature of the comments *per se*. Cf. *Ashton v. Kentucky*, 384 U.S. 195, 200. See also, *University Committee to End the War v. Gunn*, 289 F.Supp. 469 (W.D. Tex. 1968), appeal dismissed *sub nom. Gunn v. University Committee*, 399 U.S. 383 (Texas breach of peace statute violates First Amendment rights); *Thomas v. City of Danville*, 207 Va. 656, 152 S.E. 265 (Va. S.Ct. App. 1967) (Restraining order in terms of disturbing or alarming the public violates First Amendment rights). Section 6303 does not solely forbid violent and menacing *conduct* or *conduct* which tends to provoke violent and menacing conduct; it weighs upon speech. Cf. *Wright v. City of Montgomery*, 406 F.2d 867 (5th Cir. 1969) (City disorderly conduct ordinance constitutional where construed to prohibit only violent and menacing conduct).

Whatever might be said about the specificity of the words "breach of the peace," the word "tending" makes the phrase hopelessly vague. If "with intent to provoke a breach of the peace or under circumstances such that a breach of the peace may be occasioned. . ." could not pass constitutional muster in *Cox v. Louisiana*, 379 U.S. 536, 551-52, the statute here can do no better. "Intent" is, after all, a word with well defined content in the criminal law; on the other hand, "tending" is anybody's guess.

As Mr. Justice Black stated recently:

> As pointed out in *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940), common law breach of peace is at its best a confusing offense that may imperil First Amendment rights. But how infinitely more doubtful and uncertain are the boundaries of an offense including any "diversion tending to a breach of the peace***"! *Gregory v. City of Chicago*, 394 U.S. 111, 119. (Black, J. concurring)[6]

In addition to the facial obscurity of the term "tend," a question arises as to whether the defendant will be held responsible for the conduct of others. Is one charged under the statute liable only for his remarks, or for the actions of the person to whom he addresses those remarks, or for the actions of others—either his consorts or those in opposition to him—or even, the police? The boundaries of the spectrum are unclear. Limiting freedom of expression because of the mere possibility of a violent reaction on the part of others is constitutionally forbidden. *Terminiello v. City of Chicago, supra*, at 4.

Another fatal flaw in the use of the word "tending" as the nexus between words and their result is the consequent elimination of the clear and present danger test.[7] In Ga.

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[6]The majority did not reach this question: Justices Harlan and Douglas noted their agreement with Mr. Justice Black on this point.

[7]"The substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Wood v. Georgia*, 370 U.S. 375, 384. The Court notes that the clear

Code Ann. § 26-5304 (inciting to riot) the legislature linked the words with the result, using the language "a clear and present danger." Here they have not, although it has been fifty years since Mr. Justice Holmes' dictum in *Schenck v. United States*, 294 U.S. 17, 52.

The decision in *Stromberg v. California*, 283 U.S. 359 where it was held that conviction could not be had under the portion of a statute prohibiting the display of a "sign, symbol or emblem of opposition to organized government," 283 U.S. at 359, illustrates the vice of Section 6303. The Court recognized that the state could punish those "who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means." *Id.* But since the prohibited display might lead only to peaceful opposition to the government, the statute could not stand. Certainly, though, the display of the symbol, if effective, could be said to have a *tendency* to cause violence—the jury may well decide.

The Supreme Court applied *Stromberg* in *Gregory v. City of Chicago, supra.* In his concurring opinion, Mr. Justice Black goes to some length to explain exactly why the *Stromberg* case "requires reversal," *id.* He notes that "[i]n explaining the elements of the offense to the jury, the trial judge merely read the language of the ordinance," as was done in *Stromberg.* 394 U.S. at 122. And, this is all that the criminal trial judge did here with regard to the breach of the peace element. Record, *Wilson v. State*, No. 24113, Georgia Supreme Court, 232, 235. But this was grossly insufficient guidance for the jury in light of the quantum of disruption allowed in such cases as *Cox v. Louisiana*, 375 U.S. 536 and *Edwards v. South Carolina*, 372 U.S. 229. Cf. *Coates v. City of Cincinnati, supra.*

In approving the use of the bare statutory language to instruct the jury on breach of the peace (and in holding that

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and present danger does not purport to mark the furthermost constitutional boundaries of protected expression.

the words were opprobrious *per se*), the court rejected every limitation relied on by the Supreme Court to sustain the New Hampshire Supreme Court's reading of the statute in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942). Even under the assumption that *Chaplinsky* today retains its full vitality,[8] it cannot be of aid to the state here.

It is the vice of inadequate standards which allowed the jury to convict the petitioner of an offense which would ordinarily merge in the consumated battery. See *Rich v. State*, 160 Ga. 513, (Ga. S.Ct. 1925); *Jackson v. State*, 38 Ga. App. 138, (Ga. Ct. App. 1928); *Kennedy v. State*, 10 Ga. App. 794 (Ga. Ct. App. 1912). See also Ga. Code Ann. § 27-2508.

Although reformation of Section 6303 at this stage cannot serve as a basis for reinstating appellee's conviction, *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, it is likely that its "breach of the peace" segment might be constitutional if "tending" were less vague. Cf. *Williams v. District of Columbia*, 419 F.2d 638 (D.C. Cir. 1969) (*en banc*) at 646, positing a constitutional construction of the breach of peace statutes:

> "And for these purposes a breach of the peace is [constitutionally] threatened either because the language *creates a substantial risk* of provoking violence or because it is, under 'contemporary community standards,' so grossly offensive to members of the public who actually overhear *as to amount to a nuisance.*" (Footnotes omitted; emphasis supplied).

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[8] Although there is no doubt that the state can punish "fighting words" this appears to be about all that is left of the decision in *Chaplinsky*. A number of cases substantially undermine the remainder of that opinion. See, *e.g.*, *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); *NAACP v. Button*, 371 U.S. 415 (1963) (*i.e.* consideration of other possible applications of statute); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Ashton v. Kentucky*, 384 U.S. 195 (1966); *Gregory v. City of Chicago*, 394 U.S. 111 (1969). *Cf. Carroll v. President and Commissioners*, 393 U.S. 175 (1968).

The proposed Model Penal Code likewise would make certain disorderly conduct illegal if it *creates* a public annoyance,[9] but not if it only has that *tendency*. Model Penal Code § 250.2 (Proposed Official Draft, 1962); *Williams v. District of Columbia, supra,* 419 F.2d at 646-7 n. 25.

A statute which depends upon tendencies must of necessity sweep in a great variety of conduct, *Cantwell v. Connecticut,* 310 U.S. 296, 308, and as such must in turn be subject to a "heckler's veto" that is inconsistent with notions of due process and the First Amendment. *Terminiello v. City of Chicago, supra; Gregory v. City of Chicago, supra.* Just as one man's vulgarity is another's lyric, *Cohen v. California, supra,* 91 S.Ct. at 1788, so too is one man's tending to cause a breach of the peace another's stout language or vigorous criticism. The result can only be that hallmark of vagueness, total uncertainty in application.

That appellee's conviction was obtained through the vagueness of the statute can be readily seen by an examination of the facts. Any tendency on the part of the words involved to cause a breach of the peace was immediately subsumed by the battery upon the police officer. In neither battery was there any time interval between petitioner's words and the battery. Nor is there any indication in the record that the words were broadcast to a wide range of the public or the police. The only person to hear the words, in each case, was a police officer *already* in actual physical contact with petitioner.[10]

Only a vague statute could give rise to a conviction where there was never any physical disengagement so as to render the language in any way distinct from its consequences. To say, "Let go of me immediately or I will strike you," can

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[9]The Model Penal Code antedates *Coates v. City of Cincinnati, supra.*

[10]The Model Penal Code excludes police from those whose "peace and quiet" may be disturbed. Model Penal Code § 250.1, comment at pp. 13, 17 (Tent. Draft No. 13, 1961).

be seen, realistically, in no other way than as a threat of direct physical consequence. Indeed, under Georgia law, such words themselves are an assault. If the addition of a few stray profanities can render the verbal assault a new, separate, and distinct offense it is only because the statute which creates the offense is unconstitutionally sweeping, broad and vague.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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GOODING, WARDEN *v.* WILSON

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 70-26. Argued December 8, 1971—Decided March 23, 1972

Georgia statute providing that "[a]ny person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor," which has not been narrowed by the Georgia courts to apply only to "fighting" words "which by their very utterance . . . tend to incite an immediate breach of the peace," *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572, is on its face unconstitutionally vague and overbroad under the First and Fourteenth Amendments. Pp. 520–528.

431 F. 2d 855, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, and MARSHALL, JJ., joined. BURGER, C. J., filed a dissenting opinion, *post*, p. 528. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 534. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Courtney Wilder Stanton, Assistant Attorney General of Georgia, argued the cause for appellant. With him on the brief were *Arthur K. Bolton*, Attorney General, *Harold N. Hill, Jr.*, Executive Assistant Attorney General, *Dorothy T. Beasley*, Assistant Attorney General, and *Franklin Pierce*.

Elizabeth R. Rindskopf argued the cause for appellee. On the brief were *Howard Moore, Jr.*, and *Peter E. Rindskopf*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellee was convicted in Superior Court, Fulton County, Georgia, on two counts of using opprobrious words and abusive language in violation of Georgia Code

Ann. § 26–6303, which provides: "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." Appellee appealed the conviction to the Supreme Court of Georgia on the ground, among others, that the statute violated the First and Fourteenth Amendments because vague and overbroad. The Georgia Supreme Court rejected that contention and sustained the conviction. *Wilson* v. *State*, 223 Ga. 531, 156 S. E. 2d 446 (1967). Appellee then sought federal habeas corpus relief in the District Court for the Northern District of Georgia. The District Court found that, because appellee had failed to exhaust his available state remedies as to the other grounds he relied upon in attacking his conviction, only the contention that § 26–6303 was facially unconstitutional was ripe for decision.[1] 303 F. Supp. 952 (1969). On the merits

[1] The District Court stated, "Accordingly, this order will not deal with the alleged unconstitutional application of this statute nor any of the other points raised in the writ, except for the facial unconstitutionality of Georgia Code § 26–6303." 303 F. Supp., at 953. The state conviction was upon two counts of assault and battery as well as upon two counts of using opprobrious and abusive language. Appellee was also convicted of federal offenses arising out of the same incident, and those convictions were affirmed by the Court of Appeals for the Fifth Circuit. *Tillman* v. *United States*, 406 F. 2d 930 (1969). The facts giving rise to the prosecutions are stated in the opinion of the Supreme Court of Georgia as follows:

"The defendant was one of a group of persons who, on August 18, 1966, picketed the building in which the 12th Corps Headquarters of the United States Army was located, carrying signs opposing the war in Viet Nam. When the inductees arrived at the building, these persons began to block the door so that the inductees could not enter. They were requested by police officers to move from the door, but refused to do so. The officers attempted to remove them from the door, and a scuffle ensued. There was ample evidence to show that the defendant committed assault and battery on the two police officers named in the indictment. There was also

of that question, the District Court, in disagreement with the Georgia Supreme Court, held that § 26–6303, on its face, was unconstitutionally vague and broad and set aside appellee's conviction. The Court of Appeals for the Fifth Circuit affirmed. 431 F. 2d 855 (1970). We noted probable jurisdiction of the State's appeal, 403 U. S. 930 (1971). We affirm.

Section 26–6303 punishes only spoken words. It can therefore withstand appellee's attack upon its facial constitutionality only if, as authoritatively construed by the Georgia courts, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments, *Cohen* v. *California*, 403 U. S. 15, 18–22 (1971); *Terminiello* v. *Chicago*, 337 U. S. 1, 4–5 (1949). Only the Georgia courts can supply the requisite construction, since of course "we lack jurisdiction authoritatively to construe state legislation." *United States* v. *Thirty-Seven Photographs*, 402 U. S. 363, 369 (1971). It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute. At least when statutes regulate or proscribe

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sufficient evidence of the use of the opprobrious and abusive words charged, and the jury was authorised to find from the circumstances shown by the evidence that the words were spoken without sufficient provocation, and tended to cause a breach of the peace." 223 Ga. 531, 535, 156 S. E. 2d 446, 449–450.

"Count 3 of the indictment alleged that the accused 'did without provocation use to and of M. G. Redding and in his presence, the following abusive language and opprobrious words, tending to cause a breach of the peace: "White son of a bitch, I'll kill you." "You son of a bitch, I'll choke you to death."' Count 4 alleged that the defendant 'did without provocation use to and of T. L. Raborn, and in his presence, the following abusive language and opprobrious words, tending to cause a breach of the peace: "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces."'" *Id.*, at 534, 156 S. E. 2d, at 449.

speech and when "no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution," *Dombrowski* v. *Pfister*, 380 U. S. 479, 491 (1965), the transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity," *id.*, at 486; see also *Baggett* v. *Bullitt*, 377 U. S. 360, 366 (1964); *Coates* v. *City of Cincinnati*, 402 U. S. 611, 616 (1971); *id.*, at 619–620 (WHITE, J., dissenting); *United States* v. *Raines*, 362 U. S. 17, 21–22 (1960); *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

> "Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights." *Coates* v. *City of Cincinnati*, *supra*, at 619–620 (opinion of WHITE, J.) (citation omitted).

The constitutional guarantees of freedom of speech forbid the States to punish the use of words or

language not within "narrowly limited classes of speech." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571 (1942). Even as to such a class, however, because "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn," *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958), "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom," *Cantwell* v. *Connecticut*, 310 U. S. 296, 304 (1940). In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP* v. *Button*, *supra*, at 433.

Appellant does not challenge these principles but contends that the Georgia statute is narrowly drawn to apply only to a constitutionally unprotected class of words—"fighting" words—"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky* v. *New Hampshire*, *supra*, at 572. In *Chaplinsky*, we sustained a conviction under Chapter 378, § 2, of the Public Laws of New Hampshire, which provided: "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name . . . ." Chaplinsky was convicted for addressing to another on a public sidewalk the words, "You are a God damned racketeer," and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." Chaplinsky challenged the constitutionality of the statute as inhibiting freedom of expression because it was vague and indefinite. The Supreme Court of New Hampshire, however, "long be-

fore the words for which Chaplinsky was convicted," sharply limited the statutory language "offensive, derisive or annoying word" to "fighting" words:

> "[N]o words were forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed. . . .
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> . . . . . .
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> "The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . Derisive and annoying words can be taken as coming within the purview of the statute . . . only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . .
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> "The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee . . . ." 91 N. H. 310, 313, 320–321, 18 A. 2d 754, 758, 762 (1941).

In view of that authoritative construction, this Court held: "We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace." 315 U. S., at 573. Our decisions since *Chaplinsky* have continued to recognize state power constitutionally to punish "fighting" words under carefully drawn statutes not also susceptible of application to protected expression, *Cohen* v. *California*, 403 U. S., at 20; *Bachellar* v. *Maryland*, 397 U. S. 564, 567 (1970); see *Street* v. *New York*, 394 U. S. 576, 592 (1969). We reaffirm that proposition today.

Appellant argues that the Georgia appellate courts have by construction limited the proscription of § 26–6303 to "fighting" words, as the New Hampshire Supreme Court limited the New Hampshire statute. "A consideration of the [Georgia] cases construing the elements of the offense makes it clear that the opprobrious words and abusive language which are thereby prohibited are those which as a matter of common knowledge and under ordinary circumstances will, when used to or of another person, and in his presence, naturally tend to provoke violent resentment. The statute under attack simply states in statutory language what this Court has previously denominated 'fighting words.'" Brief for Appellant 6. Neither the District Court nor the Court of Appeals so read the Georgia decisions. On the contrary, the District Court expressly stated, "Thus, in the decisions brought to this Court's attention, no meaningful attempt has been made to limit or properly define these terms." 303 F. Supp., at 955. The District Judge and one member of the unanimous Court of Appeals panel were Georgia practitioners before they ascended the bench.[2] Their views of Georgia law necessarily are persuasive with us. C. Wright, Law of Federal Courts § 58, pp. 240–241 (2d ed. 1970). We have, however, made our own examination of the Georgia cases, both those cited and others discovered in research. That examination brings us to the conclusion, in agreement with the courts below, that the Georgia appellate decisions have not construed § 26–6303 to be limited in application, as in *Chaplinsky*, to words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."

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[2] Judge Sidney O. Smith, Jr., of Gainesville, Georgia, was the District Judge. Judge Lewis R. Morgan of Newnan, Georgia, a member of the Court of Appeals panel, sat as District Judge in Georgia before his appointment to the Court of Appeals.

The dictionary definitions of "opprobrious" and "abusive" give them greater reach than "fighting" words. Webster's Third New International Dictionary (1961) defined "opprobrious" as "conveying or intended to convey disgrace," and "abusive" as including "harsh insulting language." Georgia appellate decisions have construed § 26–6303 to apply to utterances that, although within these definitions, are not "fighting" words as *Chaplinsky* defines them. In *Lyons* v. *State*, 94 Ga. App. 570, 95 S. E. 2d 478 (1956), a conviction under the statute was sustained for awakening 10 women scout leaders on a camp-out by shouting, "Boys, this is where we are going to spend the night." "Get the G-- d--- bed rolls out. . . . let's see how close we can come to the G-- d--- tents." Again, in *Fish* v. *State*, 124 Ga. 416, 52 S. E. 737 (1905), the Georgia Supreme Court held that a jury question was presented by the remark, "You swore a lie." Again, *Jackson* v. *State*, 14 Ga. App. 19, 80 S. E. 20 (1913), held that a jury question was presented by the words addressed to another, "God damn you, why don't you get out of the road?" Plainly, although "conveying . . . disgrace" or "harsh insulting language," these were not words "which by their very utterance . . . tend to incite an immediate breach of the peace." *Chaplinsky* v. *New Hampshire*, *supra*, at 572.

Georgia appellate decisions construing the reach of "tending to cause a breach of the peace" underscore that § 26–6303 is not limited, as appellant argues, to words that "naturally tend to provoke violent resentment." *Lyons* v. *State*, *supra*; *Fish* v. *State*, *supra*; and *Jackson* v. *State*, *supra*. Indeed, the Georgia Court of Appeals [3] in *Elmore* v. *State*, 15 Ga. App. 461, 83 S. E.

[3] We were informed in oral argument that the Court of Appeals of Georgia is a court of statewide jurisdiction, the decisions of which are binding upon all trial courts in the absence of a conflicting decision of the Supreme Court of Georgia. Federal courts therefore

799 (1914), construed "tending to cause a breach of the peace" as mere

> "words of description, indicating the kind or character of opprobrious or abusive language that is penalized, and the use of language of this character is a violation of the statute, even though it be addressed to one who, on account of circumstances or by virtue of the obligations of office, can not actually then and there resent the same by a breach of the peace . . . .
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> ". . . Suppose that one, at a safe distance and out of hearing of any other than the person to whom he spoke, addressed such language to one locked in a prison cell or on the opposite bank of an impassable torrent, and hence without power to respond immediately to such verbal insults by physical retaliation, could it be reasonably contended that, because no breach of the peace could then follow, the statute would not be violated? . . .
>
> ". . . [T]hough, on account of circumstances or obligations imposed by office, one may not be able at the time to assault and beat another on account of such language, it might still tend to cause a breach of the peace at some future time, when the person to whom it was addressed might be no longer hampered by physical inability, present conditions, or official position." 15 Ga. App., at 461–463, 83 S. E., at 799–800.[4]

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follow these holdings as to Georgia law. *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169 (1940); *Bernhardt* v. *Polygraphic Co. of America*, 350 U. S. 198, 205 (1956).

[4] The dissents question reliance upon Georgia cases decided more than 50 years ago. But *Fish* v. *State*, 124 Ga. 416, 52 S. E. 737 (1905), and *Jackson* v. *State*, 14 Ga. App. 19, 80 S. E. 20 (1913), were cited by the Supreme Court of Georgia in 1967 in *Wilson* v. *State*, 223 Ga. 531, 156 S. E. 2d 446, to support that holding. Thus, *Fish* and *Jackson* remain authoritative interpretations of § 26-6303 by the State's highest court.

Moreover, in *Samuels* v. *State*, 103 Ga. App. 66, 67, 118 S. E. 2d 231, 232 (1961), the Court of Appeals, in applying another statute, adopted from a textbook the common-law definition of "breach of the peace."

> "The term 'breach of the peace' is generic, and includes all violations of the public peace or order, or decorum; in other words, it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community . . . . By 'peace,' as used in this connection, is meant the tranquility enjoyed by the citizens of a municipality or a community where good order reigns among its members."

This definition makes it a "breach of peace" merely to speak words offensive to some who hear them, and so sweeps too broadly. *Street* v. *New York*, 394 U. S., at 592. "[H]ow infinitely more doubtful and uncertain are the boundaries of an offense including any 'diversion *tending* to a breach of the peace' . . . ." *Gregory* v. *Chicago*, 394 U. S. 111, 119 (1969) (Black, J., concurring) (emphasis supplied).

Accordingly, we agree with the District Court that our decisions in *Ashton* v. *Kentucky*, 384 U. S. 195 (1966), and *Cox* v. *Louisiana*, 379 U. S. 536 (1965), compel the conclusion that § 26–6303, as construed, does not define the standard of responsibility with requisite narrow specificity. In *Ashton* we held that "to make an offense of conduct which is 'calculated to create disturbances of the peace' leaves wide open the standard of responsibility." 384 U. S., at 200. In *Cox* v. *Louisiana* the statute struck down included as an element congregating with others "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby." As the District Court observed, "[a]s construed by the Georgia courts, especially in the instant case, the Georgia provision as to breach of the peace is even broader than the Louisiana statute." 303 F. Supp., at 956.

We conclude that "[t]he separation of legitimate from illegitimate speech calls for more sensitive tools than [Georgia] has supplied." *Speiser* v. *Randall*, 357 U. S., at 525. The most recent decision of the Georgia Supreme Court, *Wilson* v. *State*, *supra*, in rejecting appellee's attack on the constitutionality of § 26–6303, stated that the statute "conveys a definite meaning as to the conduct forbidden, measured by common understanding and practice." 223 Ga., at 533, 156 S. E. 2d, at 448. Because earlier appellate decisions applied § 26–6303 to utterances where there was no likelihood that the person addressed would make an immediate violent response, it is clear that the standard allowing juries to determine guilt "measured by common understanding and practice" does not limit the application of § 26–6303 to "fighting" words defined by *Chaplinsky*. Rather, that broad standard effectively "licenses the jury to create its own standard in each case." *Herndon* v. *Lowry*, 301 U. S. 242, 263 (1937). Accordingly, we agree with the conclusion of the District Court, "[t]he fault of the statute is that it leaves wide open the standard of responsibility, so that it is easily susceptible to improper application." 303 F. Supp., at 955–956. Unlike the construction of the New Hampshire statute by the New Hampshire Supreme Court, the Georgia appellate courts have not construed § 26–6303 "so as to avoid all constitutional difficulties." *United States* v. *Thirty-seven Photographs*, 402 U. S., at 369.

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, dissenting.

I fully join in MR. JUSTICE BLACKMUN's dissent against the bizarre result reached by the Court. It is not merely odd, it is nothing less than remarkable that a court can

find a state statute void on its face, not because of its language—which is the traditional test—but because of the way courts of that State have applied the statute in a few isolated cases, decided as long ago as 1905 and generally long before this Court's decision in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). Even if all of those cases had been decided yesterday, they do nothing to demonstrate that the narrow language of the Georgia statute has any significant potential for sweeping application to suppress or deter important protected speech.

In part the Court's decision appears to stem from its assumption that a statute should be regarded in the same light as its most vague clause, without regard to any of its other language. Thus, since the statute contains the words "tending to cause a breach of the peace" the Court finds its result "compelled" by such decisions as *Ashton* v. *Kentucky*, 384 U. S. 195 (1966), and *Cox* v. *Louisiana*, 379 U. S. 536 (1965). The statute at bar, however, does not prohibit language "tending to cause a breach of the peace." Nor does it prohibit the use of "opprobrious words or abusive language" without more. Rather, it prohibits use "to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace." If words are to bear their common meaning, and are to be considered in context, rather than dissected with surgical precision using a semantic scalpel, this statute has little potential for application outside the realm of "fighting words" which this Court held beyond the protection of the First Amendment in *Chaplinsky*. Indeed, the language used by the *Chaplinsky* Court to describe words properly subject to regulation bears a striking resemblance to that of the Georgia statute, which was enacted many, many years before *Chaplinsky* was decided. See 315 U. S., at 573. And, if the early Georgia cases cited by the majority establish any proposition, it is that the statute, as its language so clearly indicates, is aimed at

preventing precisely that type of personal, face-to-face abusive and insulting language likely to provoke a violent retaliation—self-help, as we euphemistically call it—which the *Chaplinsky* case recognized could be validly prohibited. The facts of the case now before the Court demonstrate that the Georgia statute is serving that valid and entirely proper purpose. There is no persuasive reason to wipe the statute from the books, unless we want to encourage victims of such verbal assaults to seek their own private redress.

The Court apparently acknowledges that the conduct of the defendant in this case is not protected by the First Amendment, and does not contend that the Georgia statute is so ambiguous that he did not have fair notice that his conduct was prohibited. Nor does the Court deny that under normal principles of constitutional adjudication, appellee would not be permitted to attack his own conviction on the ground that the statute in question might in some hypothetical situation be unconstitutionally applied to the conduct of some party not before the Court. *United States* v. *Raines*, 362 U. S. 17, 21 (1960) (BRENNAN, J.). Instead, the Court relies on certain sweeping language contained in a few opinions for the proposition that, without regard to the nature of appellee's conduct, the statute in question must be invalidated on its face unless "it is not susceptible of application to speech, . . . that is protected by the First and Fourteenth Amendments."

Such an expansive statement of the technique of invalidating state statutes on their face because of their *substantial* overbreadth finds little in policy or the actual circumstances of the Court's past decisions to commend it. As the Court itself recognizes, if the First Amendment overbreadth doctrine serves any legitimate purpose, it is to allow the Court to invalidate statutes because their language demonstrates their potential for

sweeping improper applications posing a significant likelihood of deterring important First Amendment speech—not because of some insubstantial or imagined potential for occasional and isolated applications that go beyond constitutional bounds. Writing in a related context, Mr. Justice Black, only last Term, evidenced proper regard for normal principles of adjudication when he observed:

> "Procedures for testing the constitutionality of a statute 'on its face' . . . and for then enjoining all action to enforce the statute until the State can obtain court approval for a modified version, are fundamentally at odds with the function of the federal courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision; a statute apparently governing a dispute cannot be applied by judges . . . when such an application of the statute would conflict with the Constitution. *Marbury* v. *Madison,* 1 Cranch 137 (1803). But this vital responsibility, broad as it is, does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them. . . . [T]he task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judiciary. . . ." *Younger* v. *Harris,* 401 U. S. 37, 52–53 (1971).

These observations were directed specifically to the practice of issuing federal court injunctions against state prosecutions, but the problem presented by this case is much the same.

Consistent with this properly restrained approach, the overbreadth decisions of this Court, including most of those relied on by the majority, have up to now invalidated state statutes on their face only when their potential for sweeping and improper application in important areas of First Amendment concern was far more apparent—both from the language of the statute and the subject matter of its coverage—than in this case. Indeed, in many of the Court's leading cases, the statute's improper sweep and deterrent potential were amply documented by the very facts of the case before the Court. *Cox* v. *Louisiana*, 379 U. S. 536 (1965), heavily relied on by the majority, for example, involved a "breach of the peace" conviction of a leader of black students on the basis of his participation in a peaceful demonstration protesting racial discrimination and a speech urging a "sit in" at segregated lunch counters. Although the Court held, in the alternative, that a statutory prohibition against congregating with others on a public sidewalk "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby" was unconstitutionally vague and overbroad, it is clear that its primary holding was that the statute had been unconstitutionally *applied* to appellant's conduct as revealed by the record before the Court. See 379 U. S., at 545–551. In contrast to today's opinion, which mentions the facts of the instant case only by way of passing in a footnote, the *Cox* opinion contained a careful recital and examination of the facts involved, and took care to observe that there was not in the record "any evidence . . . of 'fighting words.' See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568," 379 U. S., at 551. It was clear, therefore, that in *Cox* not only the language of the statute, but the facts of the very case before the Court, involving as it did protected political speech concerning a burning issue of great social concern, were cogent and persuasive evidence of the

statute's potential for sweeping and improper applications. By way of contrast, there is nothing in the language of the Georgia statute, or even in the isolated and ancient Georgia decisions relied on by the Court today that indicates that the statute involved in this case has ever been applied to suppress speech even remotely comparable to that involved in *Cox*.

There is no need to consider each of the other decisions relied on by the majority to reach its result in detail. Suffice it to say that such cases as *Ashton* v. *Kentucky*, 384 U. S. 195 (1966); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *NAACP* v. *Button*, 371 U. S. 415 (1963), and *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), arose out of factual situations and involved statutory language and objectives so far different from the instant case in terms of the actual and apparent danger to free expression that their relevance to the case at hand is at best strained and remote.*

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*Even assuming that the statute, on its face, were impermissibly overbroad, the Court does not satisfactorily explain why it must be invalidated in its entirety. To be sure, the Court notes that "we lack jurisdiction authoritatively to construe state legislation." But that cryptic statement hardly resolves the matter. The State of Georgia argues that the statute applies only to fighting words which *Chaplinsky* holds may be prohibited, and the Court apparently agrees that the statute would be valid if so limited. The Court should not assume that the Georgia courts, and Georgia prosecutors and police, would ignore a decision of this Court sustaining appellee's conviction narrowly and on the explicit premise that the statute may be validly applied only to "fighting words" as defined in *Chaplinsky*. See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 892, 894–896, and nn. 189, 190 (1970). Where such a clear line defining the area of constitutional application is available, the fact that the Court cannot authoritatively construe the state statute to excise its unconstitutional applications should make us more, not less, reluctant to strike it down on its face. This is especially so when the Court, by relying on old Georgia cases to bolster its conclusion, virtually concedes that the plain language does not offend the First Amendment.

The Court makes a mechanical and, I suggest, insensitive application of the overbreadth doctrine today. As MR. JUSTICE BLACKMUN correctly points out, it is difficult to imagine how a State could enact a statute more clearly and narrowly aimed at regulating the type of conduct that the unanimous holding of *Chaplinsky* tells us may be regulated. It is regrettable that one consequence of this holding may be to mislead some citizens to believe that fighting words of this kind may be uttered free of any legal sanctions.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, dissenting.

It seems strange, indeed, that in this day a man may say to a police officer, who is attempting to restore access to a public building, "White son of a bitch, I'll kill you" and "You son of a bitch, I'll choke you to death," and say to an accompanying officer, "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces," and yet constitutionally cannot be prosecuted and convicted under a state statute that makes it a misdemeanor to "use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . ." This, however, is precisely what the Court pronounces as the law today.

The Supreme Court of Georgia, when the conviction was appealed, unanimously held the other way. *Wilson* v. *State*, 223 Ga. 531, 156 S. E. 2d 446 (1967). Surely any adult who can read—and I do not exclude this appellee-defendant from that category—should reasonably expect no other conclusion. The words of Georgia Code § 26-6303 are clear. They are also concise. They are not, in my view, overbroad or incapable of being understood. Except perhaps for the "big" word "opprobrious"—and no point is made of its bigness—any

Georgia schoolboy would expect that this defendant's fighting and provocative words to the officers were covered by § 26–6303. Common sense permits no other conclusion. This is demonstrated by the fact that the appellee, and this Court, attack the statute not as it applies to the appellee, but as it conceivably might apply to others who might utter other words.

The Court reaches its result by saying that the Georgia statute has been interpreted by the State's courts so as to be applicable in practice to otherwise constitutionally protected speech. It follows, says the Court, that the statute is overbroad and therefore is facially unconstitutional and to be struck down in its entirety. Thus Georgia apparently is to be left with no valid statute on its books to meet Wilson's bullying tactic. This result, achieved by what is indeed a very strict construction, will be totally incomprehensible to the State of Georgia, to its courts, and to its citizens.

The Court would justify its conclusion by unearthing a 66-year-old decision, *Fish* v. *State*, 124 Ga. 416, 52 S. E. 737 (1905), of the Supreme Court of Georgia, and two intermediate appellate court cases over 55 years old, *Jackson* v. *State*, 14 Ga. App. 19, 80 S. E. 20 (1913), and *Elmore* v. *State*, 15 Ga. App. 461, 83 S. E. 799 (1914), broadly applying the statute in those less permissive days, and by additional reference to (a) a 1956 Georgia intermediate appellate court decision, *Lyons* v. *State*, 94 Ga. App. 570, 95 S. E. 2d 478, which, were it the first and only Georgia case, would surely not support today's decision, and (b) another intermediate appellate court decision, *Samuels* v. *State*, 103 Ga. App. 66, 118 S. E. 2d 231 (1961), relating not to § 26–6303, but to another statute.

This Court appears to have developed its overbreadth rationale in the years since these early Georgia cases. The State's statute, therefore, is condemned because the

State's courts have not had an opportunity to adjust to this Court's modern theories of overbreadth.

I wonder, now that § 26–6303 is voided, just what Georgia can do if it seeks to proscribe what the Court says it still may constitutionally proscribe. The natural thing would be to enact a new statute reading just as § 26–6303 reads. But it, too, presumably would be overbroad unless the legislature would add words to the effect that it means only what this Court says it may mean and no more. See Criminal Code of Georgia § 26–2610 (1969).

I cannot join the Court in placing weight upon the fact that Judge Smith of the United States District Court had been a Georgia practitioner and that Judge Morgan of the Court of Appeals had also practiced in that State. After all, each of these Georgia federal judges is bound by this Court's self-imposed straitjacket of the overbreadth approach. Judge Smith's personal attitude is clear, for he said:

> "[T]his Court does not see any policy reasons for upholding the right of a person to use the type of language expressed by this petitioner. It strains the concept of freedom of speech out of proportion when it is argued that such language is and should be protected." 303 F. Supp. 952, 955 (ND Ga. 1969).

And the Court of Appeals joined in this comment when, on the point at issue here, it merely agreed "with the well reasoned opinion of the district court." 431 F. 2d 855, 859 (CA5 1970).

For me, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), was good law when it was decided and deserves to remain as good law now. A unanimous Court, including among its members Chief Justice Stone and Justices Black, Reed, DOUGLAS, and Murphy, obviously thought

it was good law. But I feel that by decisions such as this one and, indeed, *Cohen* v. *California*, 403 U. S. 15 (1971), the Court, despite its protestations to the contrary, is merely paying lip service to *Chaplinsky*. As the appellee states in a footnote to his brief, p. 14, "Although there is no doubt that the state can punish 'fighting words' this appears to be about all that is left of the decision in *Chaplinsky*." If this is what the overbreadth doctrine means, and if this is what it produces, it urgently needs re-examination. The Court has painted itself into a corner from which it, and the States, can extricate themselves only with difficulty.